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NO. 73-1612

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

URBAN B. LUETKEMEYER, et al.,

Appellants,

vs.

HAROLD KAUFMANN, et al.,

Appellees.

On Appeal from the
United States District Court
for the
Western District of Missouri
Central Division

JURISDICTIONAL STATEMENT

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

URBAN B. LUETKEMEYER,
AND
KENNAN L. LUETKEMEYER
AND JACQUELINE LUETKEMEYER,
BY NEXT FRIEND URBAN B.
LUETKEMEYER,

Appellants,

vs.

HAROLD KAUFMANN, MARGARET HIGGINS,
JAMES STARK, ROBERT BEMBOOM,
CLETUS HIRSCHVOGEL, AND JOHN
LUECKENOTTE,
being members of the board of
directors of R-III Cole County
School District;

F. BURTON SAWYER, E.J. MELTON,
JACK WEBSTER, SIDNEY R. REDMOND,
DALE M. THOMPSON, W.C. BANTA,
HARVEY B. YOUNG, JR., MRS. ELEANOR
B. GRIFFITH, being members of the
state board of education of the State
of Missouri,

and ARTHUR L. MALLORY, Commissioner
of Education of the State of Missouri,

Appellees.

INDEX

	Page
Preliminary Statement	1
Opinion Below	3
Jurisdiction	4
Statutes Involved	6
Questions Presented	7
Statement of the Case	10
The Questions are Substantial.	36
Appendix to Jurisdictional Statement - See Accompanying Document	

TABLE OF CITATIONS

Cases Cited:

	Page
Adams v. County Com'rs. of St. Mary's County, 180 Md. 550, 26 A.2d 377	40
Alexander v. Bartlett, 14 Mich. App. 177, 165 N.W. 2d 445.....	41
American United Inc. etc. v. Ind. Sch. Dist. etc. (1970), 179 N.W. 2d 146, appeal dismissed 403 U.S. 945.....	40
Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 A. 628	40
Bowker v. Baker, 73 Cal. App.2d 653, 167 P.2d 256	40
Brown v. Board of Education, 347 U.S. 483	55
Brown v. Louisiana, (1966) 383 U.S. 131	50
Cottonreader v. Johnson (M.D. Ala. 1966) 252 F. Supp. 492 ...	49
Detroit Edison Co. v. East China TP, School District No. 3, (D.C. Mich. 1965) 247 F. Supp. 296, Aff'd. 378 F. 2d 225, Cert. Denied, 389 U.S. 932	76

page

Downie v. Powers (10th Cir. 1951) 193 F.2d 760 49

Dunn v. Blumstein, 405 U.S. 330... 73

Everson v. Board of Education, 330 U.S. 1 (1946).. 39,43,47,48,52,81

Hague v. C.I.O., (1939) 307 U.S. 496 49

Harper v. Virginia Board of Elections, 383 U.S. 663 80

In Re Proposal C (Mich. 1971) 185 N.W. 2d 9 59,60,69,79

Kelly v. Page (5th Cir. 1964) 335 F. 2d 114 49

Lemon v. Kurtzman, 403 U.S. 602 .. 81

Lynch v. U.S. (5th Cir. 1951) 189 F.2d 476, 342 U.S. 831 49

Luetkemeyer v. Kaufmann, 364 F. Supp. 376 3

Levy v. Louisiana, 391 U.S. 68 ... 56

McVey v. Hawkins (1953), 364 Mo. 44, 258 S.W. 2d 927 33

Nichols v. Henry, (1945), 301 Ky. 434, 191 S.W. 2d 930 40,80

Oregon v. Mitchell, 400 U.S. 112.. 72

Pierce v. Society of Sisters, 268 U.S. 510 52,63

page

Radio Corp. of America v. U.S., 341 U.S. 412 6

Reynolds v. Sims, 377 U.S. 533 .. 56

Rhoades v. Abington Township School District, 424 Pa. 202, 226 A.2d 53 41

St. Augustine High School v. Louisiana High School Athletic Ass'n. (E.D. La. 1967) 270 F. Supp. 767 65

St. John v. Wisconsin Employment Relations Board, 340 U.S. 411.. 5

Sanders v. Gray, (D.C. Ga.) 203 F. Supp. 158 56

Shapiro v. Thompson, 394 U.S. 618 56,73

Sherbert v. Verner, 374 U.S. 398 64,68,73

Skinner v. Oklahoma, 316 U.S. 535 55

Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 ... 40

State ex rel. Hughes v. Bd. of Education of Kanawha County, W.Va., 174 S.E. 2d 711, Cert. Denied, appeal dismissed, 403 U.S. 944 ... 41,57,58,60,66,68,79

page

State ex rel. Sch. Dist. Nebraska St. Bd. of Ed., 195 N.W. 2d 161, Cert. Denied, 409 U.S. 921 59,60,69,79

United States v. Jackson, 390 U.S. 570 73

U.S. v. Klans (M.D. Ala. 1961) 194 F. Supp. 897 49

West Morris Regional Bd. of Education v. Sills, 279 A.2d 609, Cert. Denied, 404 U.S. 986 41

Williams v. Wallace, (1965, M.D. Ala.) 240 F. Supp. 100 49

Constitutional Provisions and Statutes Cited

	Page
1st Amendment, U.S. Constitution	4,9,67,69,70
14th Amendment, U.S. Constitution	4,8,9,10,54,57,58,61,75,74
Article IX, §. 5, Missouri Constitution ...	33
28 U.S.C., §. 1253	5
28 U.S.C., §. 1343	4
28 U.S.C., §. 2281	4
28 U.S.C., §. 2284	4
42 U.S.C., §. 1983	4,8
42 U.S.C., §. 1988	4
§. 163.061, Revised Statutes of Missouri, 1969	6,14
§. 163.161, Revised Statutes of Missouri, 1969	6,14
§. 165.011, Revised Statutes of Missouri, 1969	6,14
§. 167.031, Revised Statutes of Missouri, 1969	16,52,64

page

S. 167.231, Revised Statutes of Missouri, 1969 6,14

S. 167.251, Revised Statutes of Missouri, 1969 6,14

On Appeal
From the United States District Court
For The
Western District of Missouri
Central Division.

JURISDICTIONAL STATEMENT.

PRELIMINARY STATEMENT.

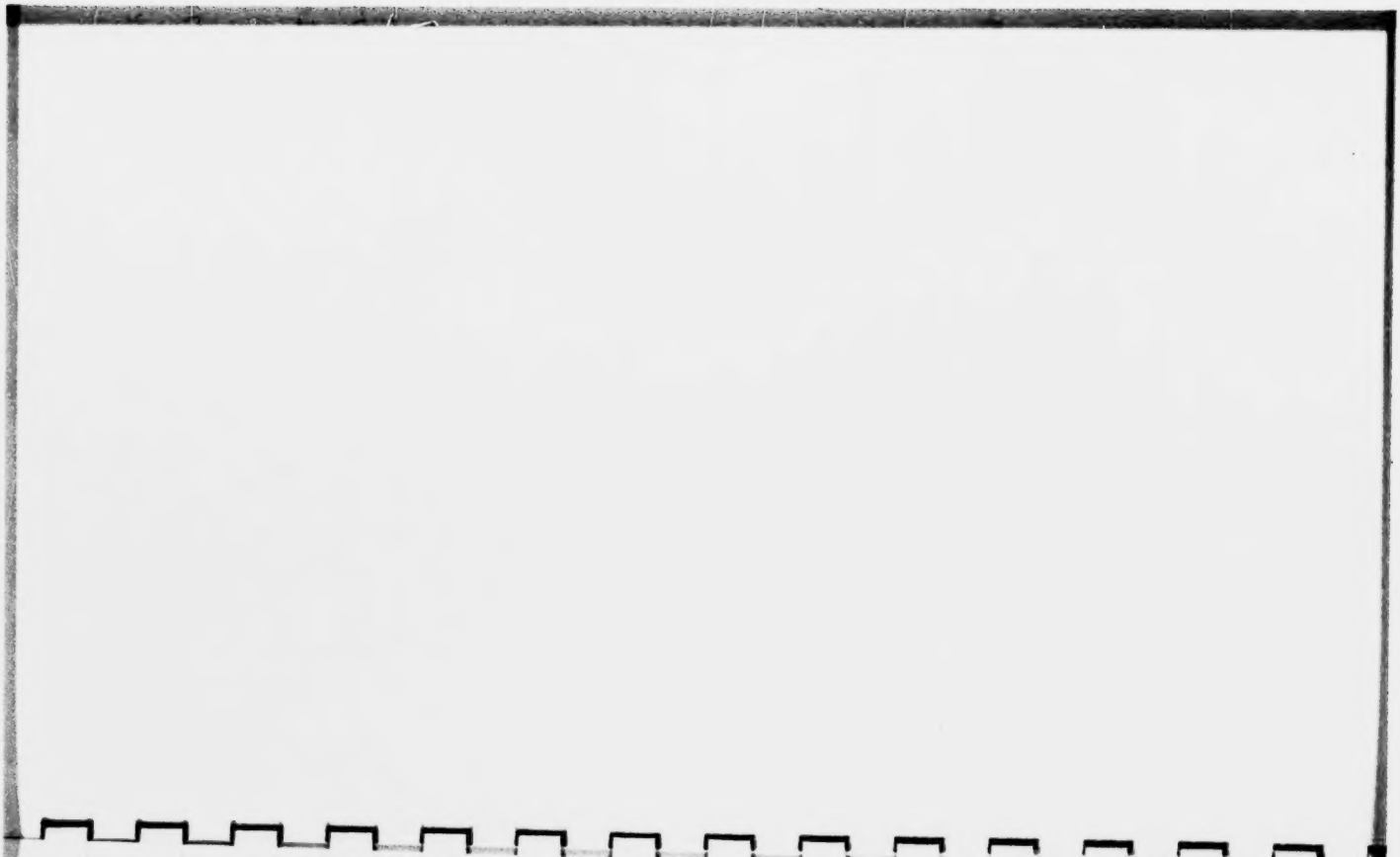
This is an appeal from the opinion, judgment, and decree of the United States District Court for the Western District of Missouri, Central Division. Appellants were the plaintiffs in the court below. Their complaint alleged that certain statutes of the State of Missouri are in contravention of the United States Constitution. The complaint demanded that the court enter its judgment declaring the statutes to be unconstitutional and that the court enter its order enjoining the administration and enforcement of said statutes.

A three-judge court was convened to hear the cause and its judgment declaring the statutes in question not to be unconstitutional and denying the demand for an injunction enjoining the enforcement of said statutes was concurred in by two members of the court, viz., the Honorable John W. Oliver, and the Honorable William R. Collinson, Judges of the United States District Court for the Western District of Missouri. The third member of the court, the Honorable Floyd R. Gibson, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, dissented from this judgment. This statement is submitted to show that the Supreme Court of the United States has jurisdiction over this appeal and that a substantial question is presented.

Supreme Court Rule 15 requires that there be appended to this Jurisdictional Statement a copy of the Opinion of the court below and its Judgment and Decree, a copy of the statutes involved the validity of which are in question, a copy of the Order on Rehearing, and the Notice of Appeal. Inasmuch as these Appendices are voluminous they are set forth in a separate document filed together with this Jurisdictional Statement entitled Appendix to Jurisdictional Statement.

OPINION BELOW

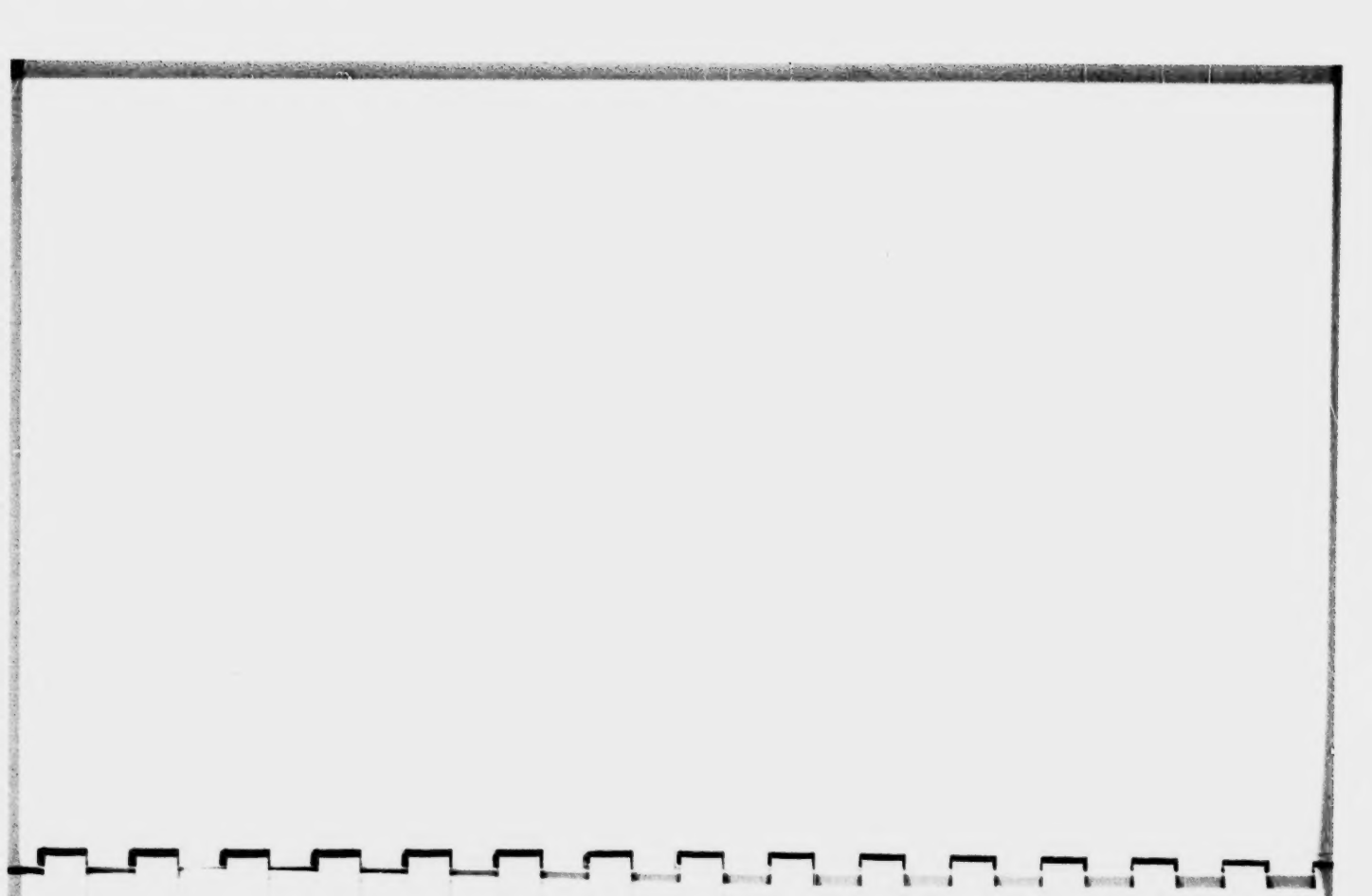
The opinion of the court below which includes the Findings of Fact, Conclusions of Law, and the Judgment appealed from is Urban B. Luetkemeyer, et al. v. Harold Kaufmann, et al., 364 F. Supp. 376. The opinion and the judgment are set forth



in Appendix to Jurisdictional Statement as Appendix I.

JURISDICTION

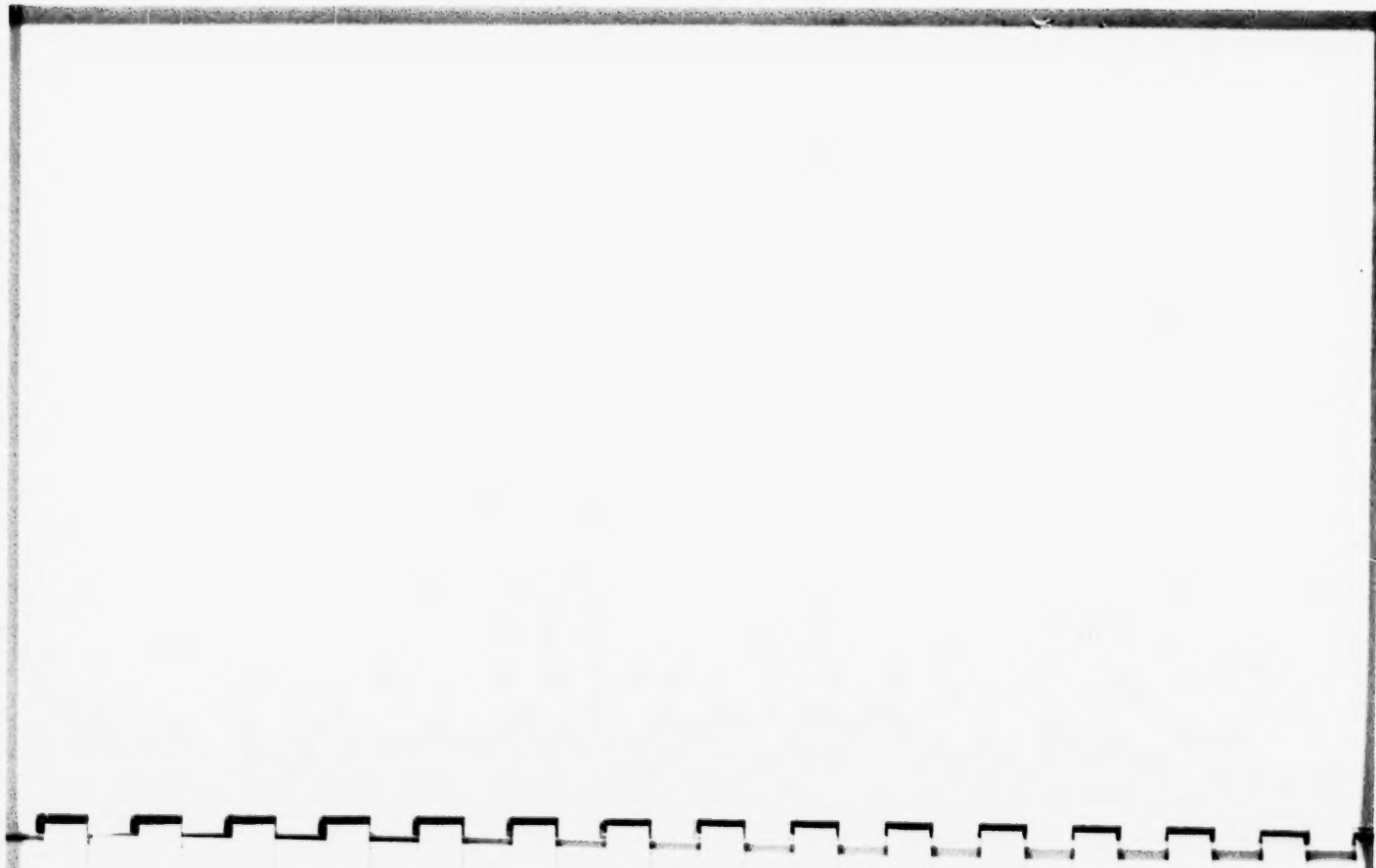
The complaint alleges that the statutes of the State of Missouri which provide for transportation to and from school for children attending public schools and which deny such transportation to children attending non-public schools are violative of the 1st and 14th Amendments to the Constitution of the United States. The complaint was brought pursuant to Title 28 U.S.C., Sections 2281 and 2284. The complaint is also founded upon Title 28 U.S.C., Section 1343 and Title 42 U.S.C., §. 1983 and 1988.



The judgment denying relief which is sought to be reviewed was dated and entered on September 24, 1973. An order denying plaintiffs' Motion for New Trial was dated October 30, 1973 and filed October 29, 1973. Plaintiffs' Notice of Appeal was filed in the United States District Court, Western District of Missouri, Central Division, on December 28, 1973.

Title 28 U.S.C., Section 1253, is believed to confer on this court jurisdiction of the appeal.

St. John v. Wisconsin Employment Relations Board, 340 U.S. 411 and Radio



Corp. of America v. U.S., 341 U.S. 412 are cases which appellants believe sustain the jurisdiction of this court.

STATUTES INVOLVED

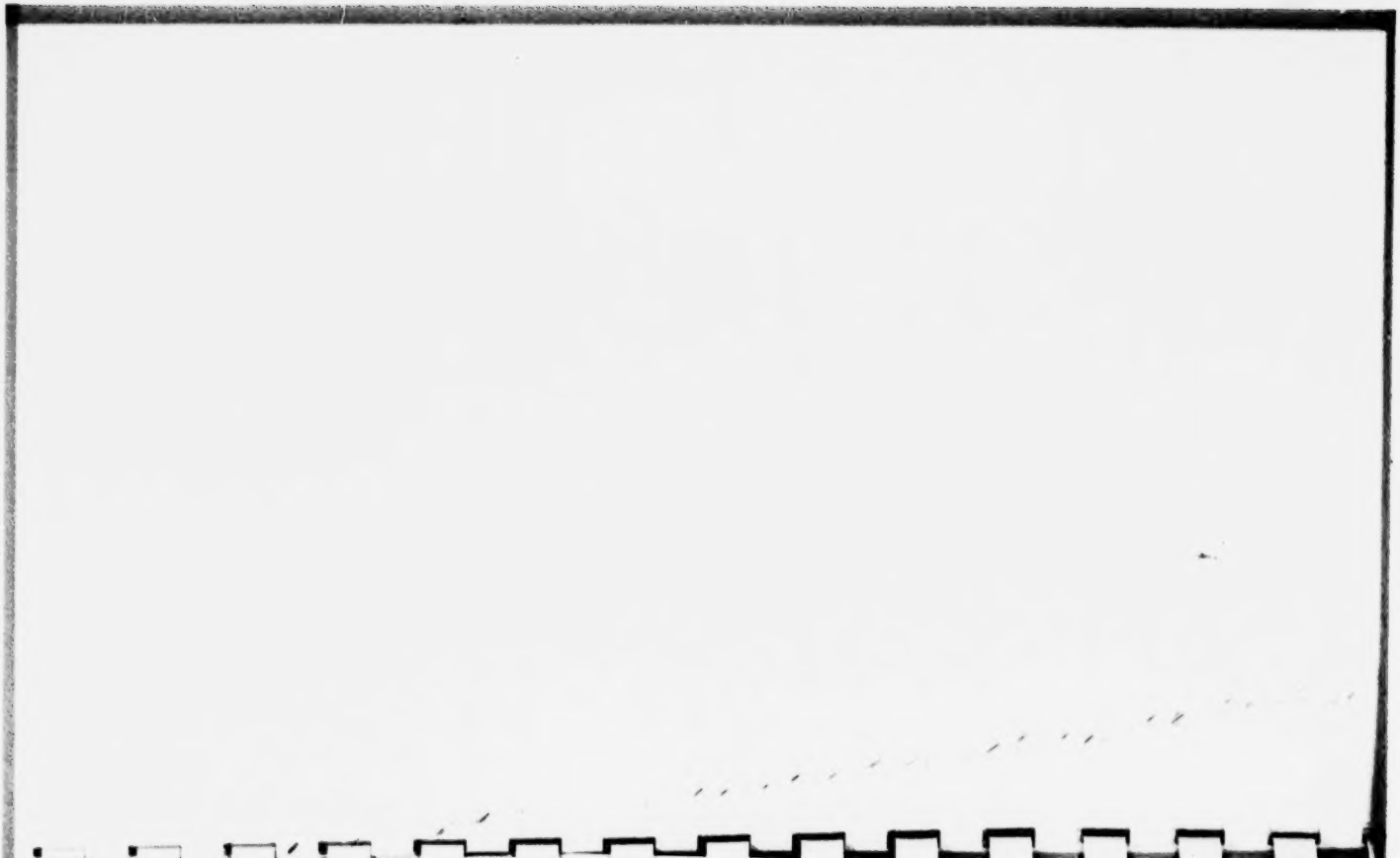
The validity of the following statutes of the State of Missouri are involved in this proceeding:

Section 167.231, Transportation of Pupils within all Except Metropolitan Districts, Missouri Revised Statutes, 1969, Volume 2, page 1344.

Section 167.251, Board to Prescribe Rules and Regulations, etc., Missouri Revised Statutes, 1969, Volume 2, page 1344 and 1345.

Section 163.161, State Aid for Transportation of Pupils, Missouri Revised Statutes, 1969, Volume 2, page 1318.

Section 163.061, Allocation of State Aid to District Funds, Missouri Revised Statutes, 1969, Volume 2, page 1316.



Section 165.011, District Funds - Allocation of Moneys, etc., Missouri Revised Statutes, Volume 2, page 1327.

These statutory provisions are lengthy and the full text thereof is set forth in Appendix to Jurisdictional Statement as Appendix V.

QUESTIONS PRESENTED

1.

Do the statutes of the State of Missouri which provide for the transportation at public expense of children to and from home and school constitute public welfare legislation that provides a public benefit which must be available to all persons on a non-discriminatory basis?

2.

Does the transportation of children at public expense to and from home and school have as its purpose and effect the protection of the health, safety and welfare of children going to and coming from school, and does said transportation serve the further purpose of enabling and assisting parents and children in complying with the compulsory school attendance law?

3.

Is the transportation at public expense of children going to and from school a public service and facility which cannot be refused, withheld, or denied to any person by reason of race, creed, color, religion, national origin, or ancestry?

4.

Does the refusal of defendants to permit plaintiffs to use the school bus facilities, operated by defendants at public expense, for the purpose of going to and from plaintiffs' home and a non-public school cause plaintiffs to be subjected by defendants under color of statutes, regulation, custom, or usage of the State of Missouri, to deprivation of rights, privileges or immunities secured by the Constitution of the United States as contemplated by Title 42 U.S.C. 1983?

5.

Does the refusal of defendants to allow plaintiffs to avail themselves of the public benefit and the public services and facilities of the school bus transportation operated and maintained by defendants at public expense, in going to and from plaintiffs' home and a non-public school, constitute invidious discrimination against plaintiffs and deny to plaintiffs the equal protection of the laws as guaranteed to plaintiffs by the 14th Amendment to the United States Constitution?

6.

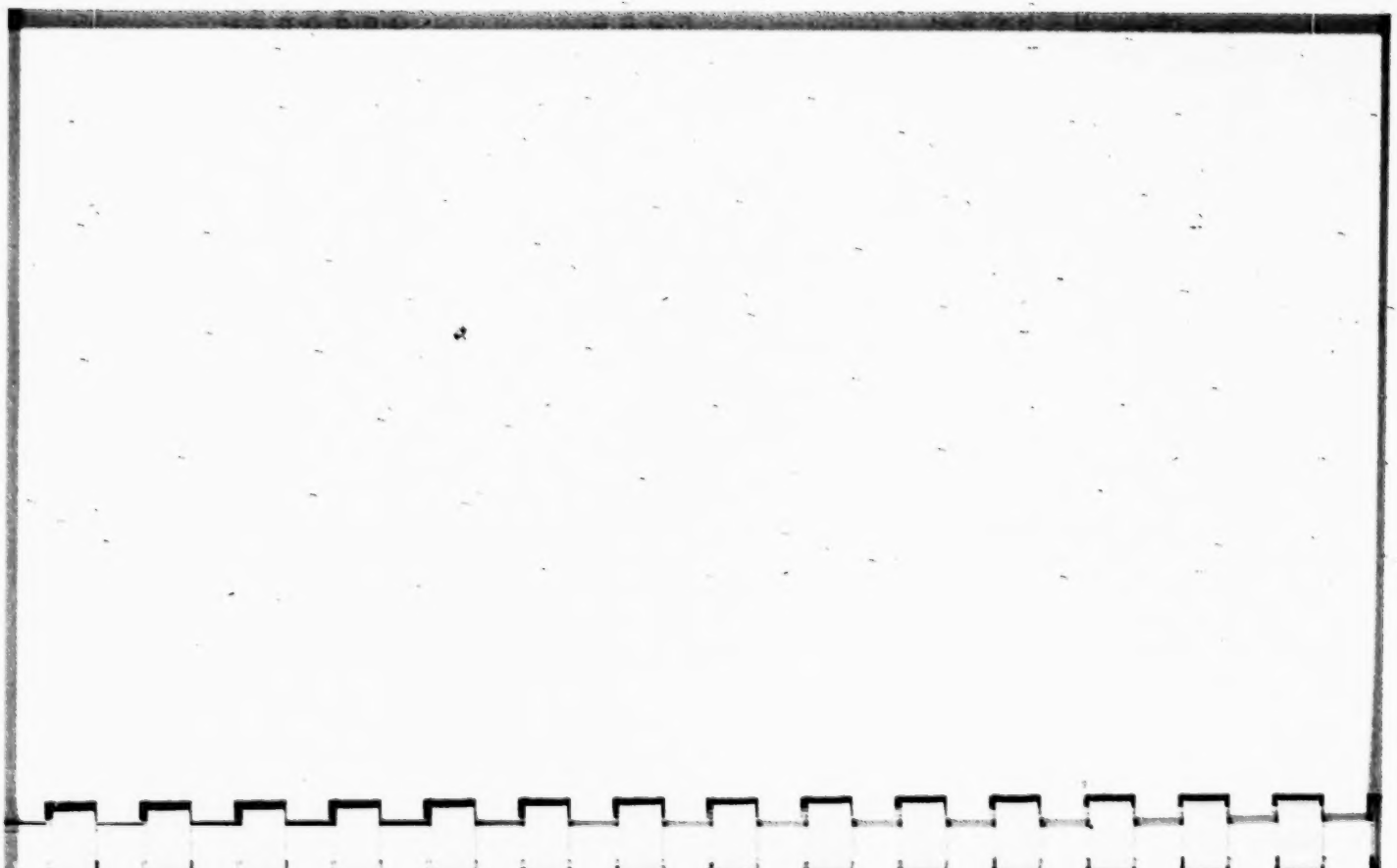
Do the statutes of the State of Missouri which provide transportation to children attending public schools and which deny said transportation to children attending non-public schools constitute laws made and enforced by the State of Missouri which abridge the privileges or immunities of plaintiffs to enjoy the school bus transportation provided for therein on an equal basis with all other citizens of the State of Missouri as guaranteed to plaintiffs by the 14th Amendment to the United States Consitution?

7.

Do the statutes of the State of Missouri which provide transportation to and from school to children attending public schools and which deny said transportation to children attending non-public schools interfere with plaintiff Urban B. Luetkemeyer in the exercise of his fundamental right to direct the upbringing and education of his children?

8.

Does the denial to plaintiffs by defendants of school bus transportation to and from plaintiffs' home and school for the reason that said school is a non-public school operated by a church impose a burden on the free exercise of plaintiffs' religion in contravention of the 1st and 14th Amendments to the Constitution of the United States?



9.

Does the levy and collection of taxes by Cole County, Missouri and the State of Missouri against plaintiff Urban B. Luetkemeyer, for the purpose of establishing and maintaining school bus transportation, and the denial to plaintiff the use of said transportation for the health, safety and welfare of his children in going to and from school, take his property for a public benefit while denying to him the enjoyment of said benefit on an equal basis with all other citizens of the State of Missouri, constitute the arbitrary taking of his property without compensation and deprive him of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Urban B. Luetkemeyer, his son Kennan, age 14, and his daughter Jacqueline, age 10, were the plaintiffs in the court below and are the appellants in this case. The Luetkemeyers live in a rural area of Cole County, Missouri adjacent to U.S. Highway 50. Their home is within the boundaries of R-III Cole County School District, a public school district, and the school operated and maintained by the

district is located approximately 7 miles west of the Luetkemeyer home in the village of Centertown. A bus operated by the school district passes by the Luetkemeyer home on U.S. Highway 50 going to and coming from the school.

St. Martins is a village located about 2 miles west of the Luetkemeyer home on U.S. Highway 50. The Catholic Church at St. Martins operates an elementary school for grades one through eight. The Luetkemeyers are members of the Catholic Church and Kennan and Jacqueline are full time students in St. Martins School.

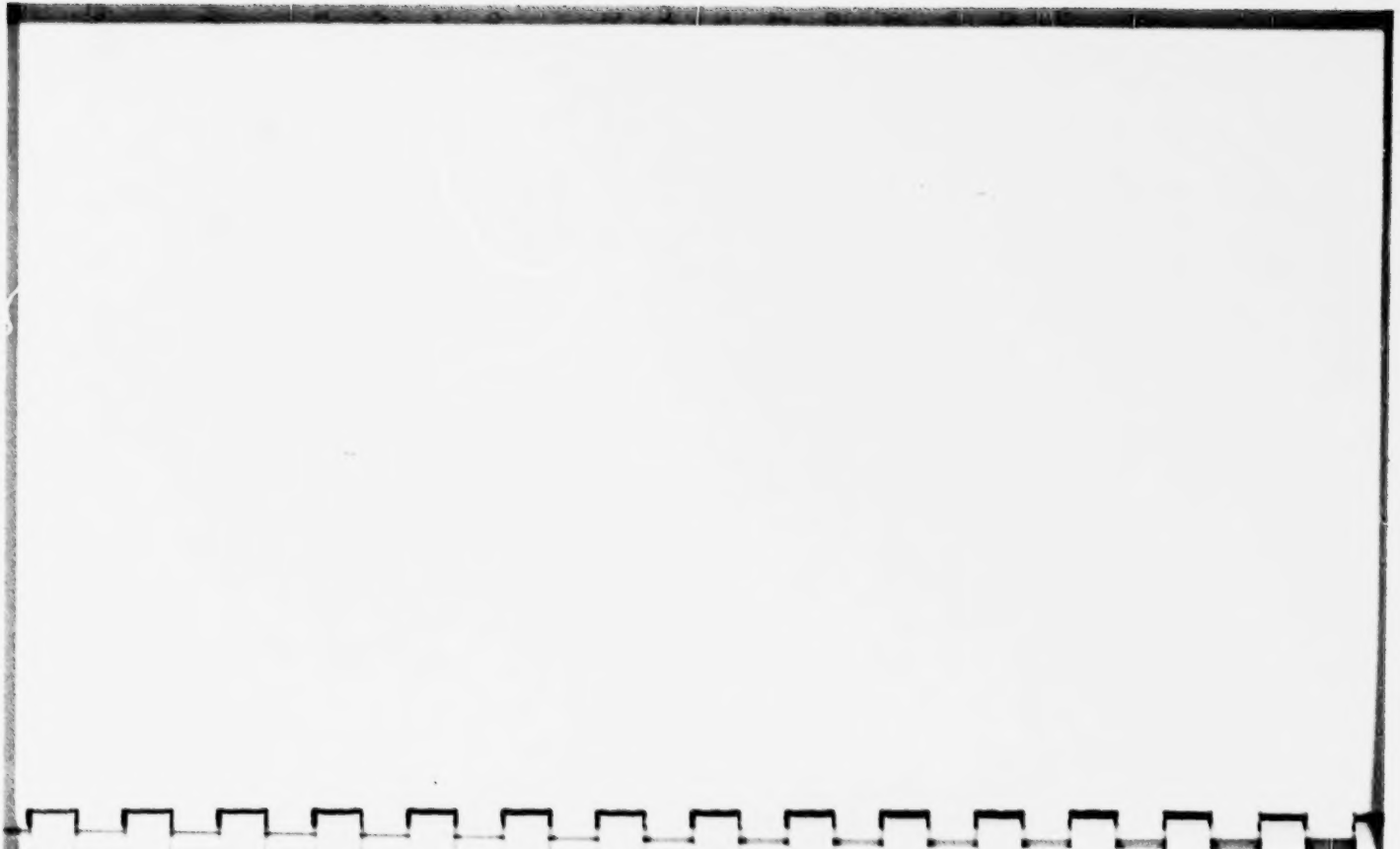
School buses operated by R-III Cole County School District pass by the Luetkemeyer home on U.S. Highway 50 and continue on by St. Martins School which is attended by the Luetkemeyer children. The

Luetkemeyers have demanded that transportation be provided them to and from their residence and St. Martins School on this school bus but the transportation has been refused by the school board of R-III Cole County School District for the reason that the Luetkemeyer children are attending a non-public school.

U.S. Highway 50 is a typical two-lane concrete highway. The route which the Luetkemeyer children must follow in going to and from home and St. Martins School has an average daily traffic of 5,650 vehicles. There are no paved sidewalks or walkways, traffic control devices, and protected pedestrian crosswalks on the route.

It is the established public policy of the State of Missouri to provide transportation to and from school for all

children who live more than a certain distance from school. Hazards to the health, safety, and welfare of children in going to and from school increase the greater the distance that the child lives from school. For example, transportation is not needed for the protection of the health, safety, and welfare of the child who lives adjacent to the school property. However, transportation is needed to protect the health, safety, and welfare of the child who lives three miles from school in a rural area. Therefore, the public policy provides that transportation must be provided for all children living more than 3 1/2 miles from school and may be provided for all children living one mile or more from school. The benefits of transportation to and from school are available only to children who



attend public schools,

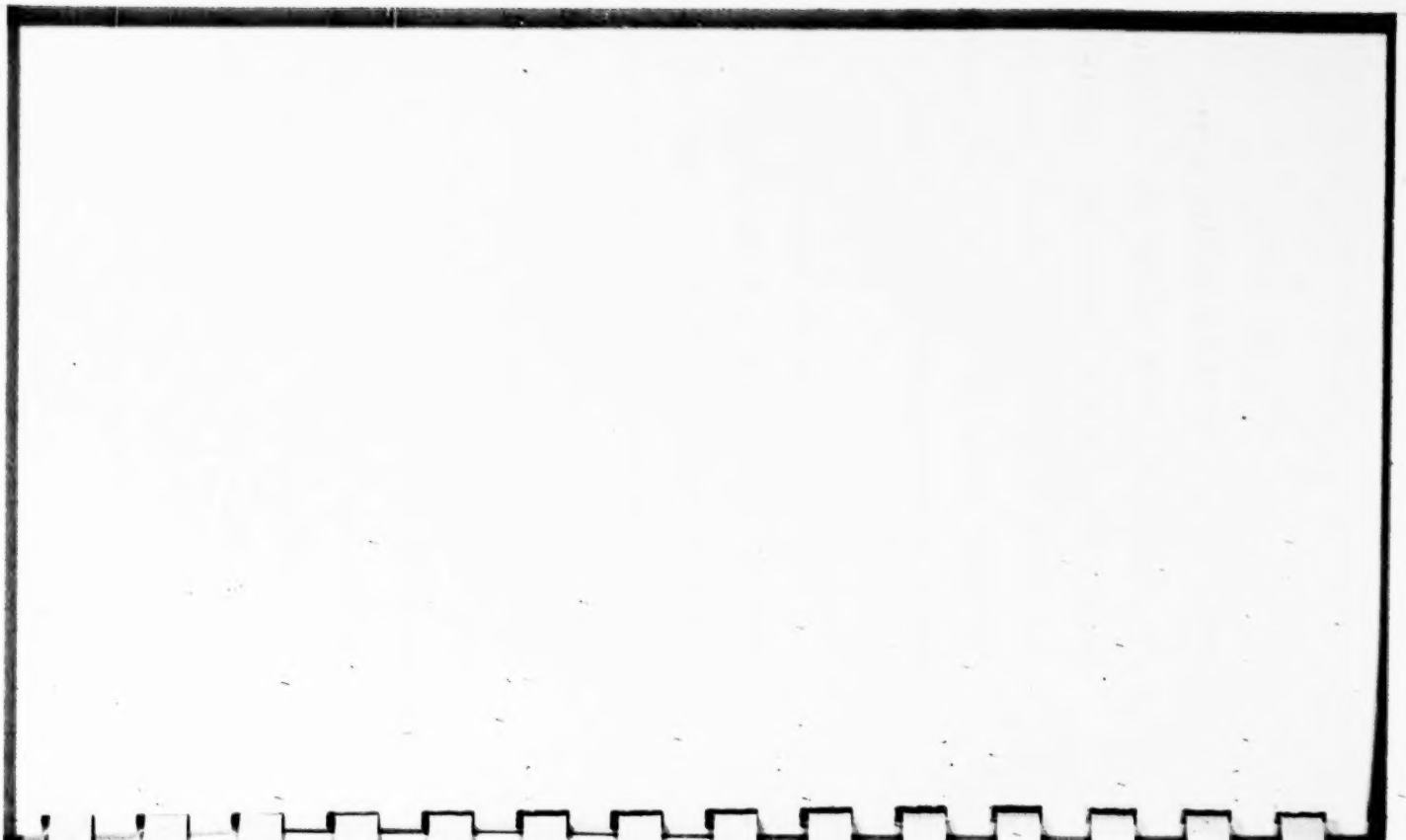
It is the duty of the school boards of the various public school districts to provide transportation for children to and from school pursuant to §. 167.231 and 167.251 RSMo. It is the duty of the State Board of Education to supervise and approve bus routes for the transportation of children to and from school under Section 163.161 RSMo. The funding of the costs of transporting children to and from school, through state and local funds derived from state and local taxes, is provided for by §. 167.251 and 163.061 RSMo. Other statutes which relate to the funding of transportation are §. 163.161 and 165.011 RSMo.

During the 1970-71 school year there were 205 children enrolled in grades one through eight in St. Martins School. The

homes of all of these children are located within the boundaries of Cole County R-III School District. During the 1970-71 school year there were 207 children enrolled in grades one through eight in attendance in Cole County R-III School.

Cole County R-III School District with the assistance and cooperation of the State Board of Education has established and operates a system of school bus transportation to and from home and school for children who attend the public school maintained and operated by the district. Free transportation is offered to all children who live one mile or more from the school. During the 1970-71 school year 130 children were transported daily on the average.

St. Martins School does not provide



transportation for the children attending the school. The parents or guardians of the children have the sole responsibility for getting the children to and from school. Approximately 100 children attending St. Martins School live more than one mile from that school. The homes of most of these children are located along existing school bus routes operated by Cole County R-III School.

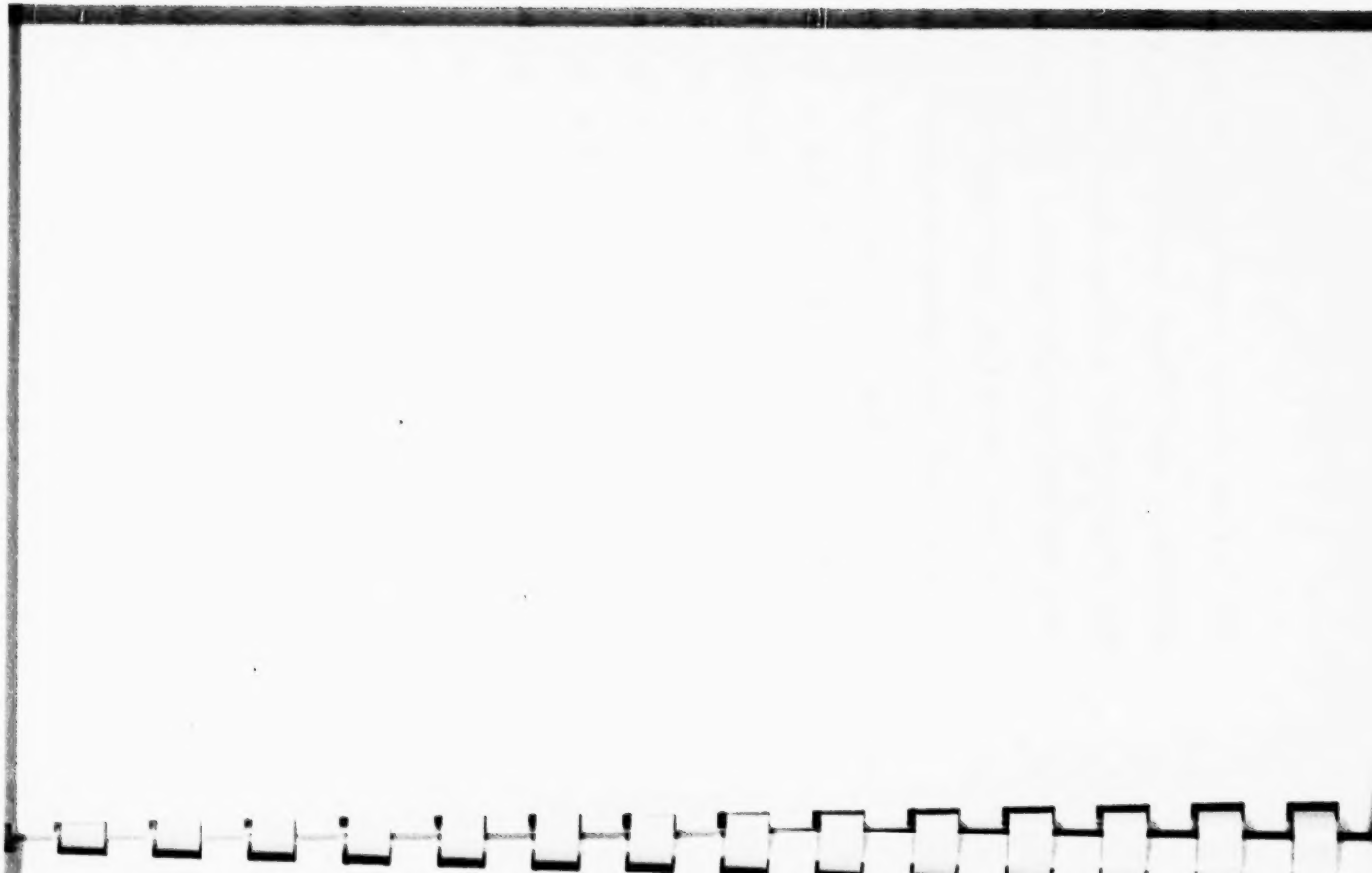
St. Martins School meets the curriculum requirements of Missouri law and attendance at the school meets the requirements of the Missouri Compulsory School Attendance Law, §. 167.031 RSMo. It is a non-profit school and its sole source of income is the contributions and donations from patrons and friends and fees charged to the children in attendance.

The appellant Urban Luetkemeyer owns real property in Cole County, Missouri and he owns and operates a business in Cole County, Missouri. In 1970 he paid more than $985 in real and personal property taxes to Cole County, more than $625 in income taxes to the State of Missouri, and more than $250 in sales taxes to the State of Missouri. As the owner and operator of a retail business establishment he collected from his customers and paid to the State of Missouri more than $4,250 in sales taxes in 1970. During the past 20 years he has collected from his customers $50,000 in sales taxes for the State of Missouri and approximately $60,000 in gasoline taxes for the State of Missouri and the federal government. The income taxes and sales taxes paid by Urban Luetkemeyer

and the sales taxes collected by him from his customers have been paid to the State of Missouri and deposited in the General Revenue Fund of the State of Missouri and a portion of that fund has been appropriated to the Public School Fund of the State of Missouri. A portion of the Public School Fund has been allocated and paid by the State of Missouri to the Cole County R-III School District for the cost of providing transportation of children to and from school.

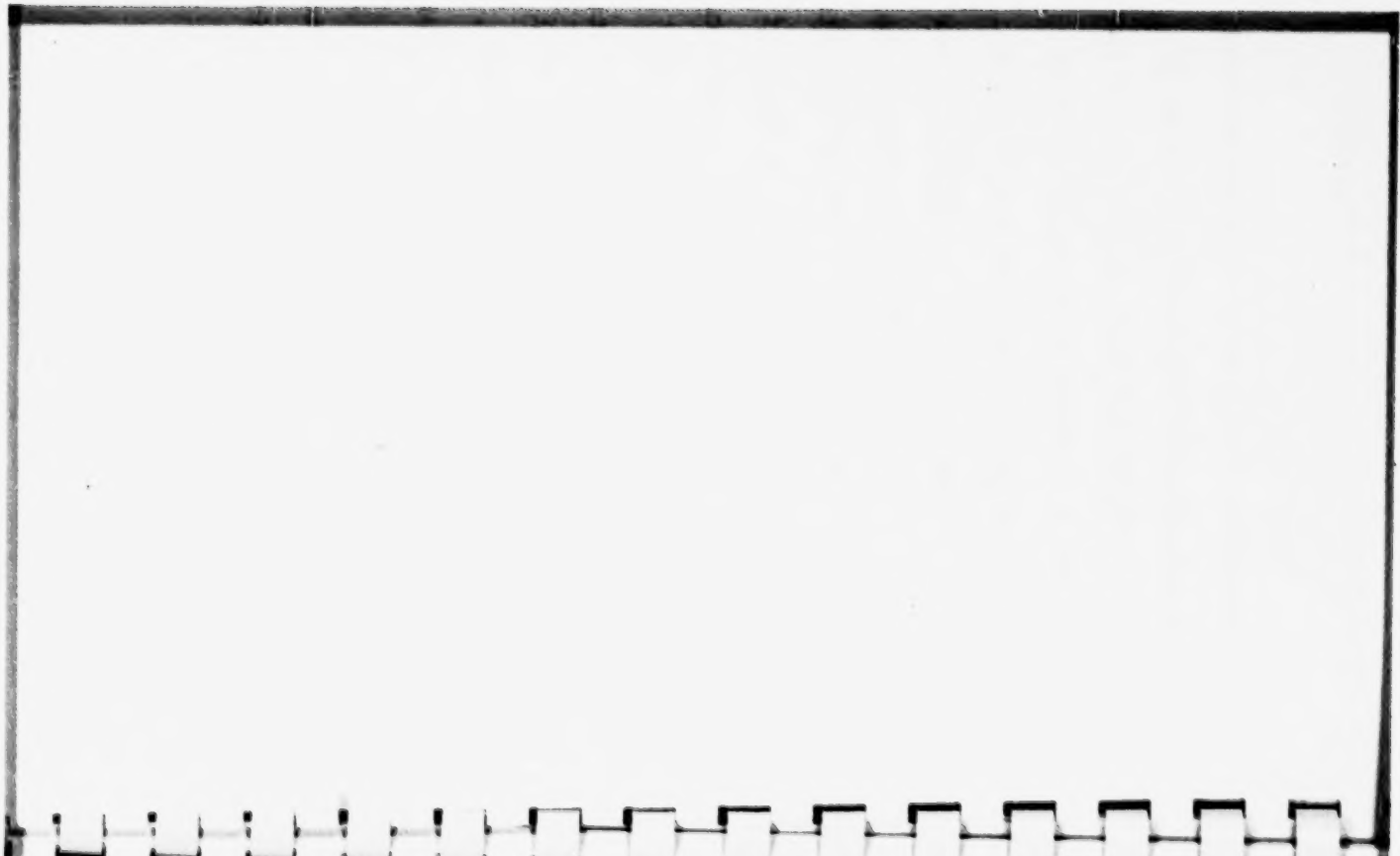
The transportation of children in safety and in good health is a massive coordinated effort carried out by public agencies and officials on the national, state and local levels. The prime objective of these efforts is the safety and welfare of the child. The National Highway Traffic Safety Administration of

the United States Department of Transportation has issued comprehensive rules and regulations setting requirements for safe equipment; maintenance of equipment; selection, training, and supervision of drivers; and administrative provisions in regard to Pupil Transportation Safety. The National Conference on School Transportation sponsored by American Association of School Administrators, Association of State Directors of Pupil Transportation Services, Council of Chief State School Officers, Florida Department of Education, National Commission on Safety Education, NEA, Rural Education Association and U.S. Office of Education has promulgated standards for school bus operation designed to promote the maximum protections for the health, safety, and welfare of the children being transported. The Missouri State Board of



Education has issued regulations and standards for the transportation of children to and from school which have as their primary purpose to provide safe transportation for the children. Cole County R-III School District has issued rules and regulations with the approval of the State Board of Education relating to the safety and welfare of children in transportation to and from school. The General Assembly of the State of Missouri and the United States Congress have enacted state and local laws which seek to insure the safety, health, and welfare of children in public transportation to and from school.

The transportation of children to and from school is a massive effort in time and energy throughout the United States. In the 1969-70 school year,



19,500,000 children were transported daily to and from school. Two hundred eighty-five thousand vehicles were utilized in this transportation. School buses transport more passengers than any other transportation system. School buses transport 5.9 billion passengers annually, city buses carry 5.8 billion passengers annually, rapid transit systems transport 2.1 billion persons annually, inter-city buses transport 0.4 billion passengers annually. Railroads transport 0.3 passengers annually, and airlines transport 0.1 billion passengers annually.

The transportation of children to and from public schools in the state of Missouri is a vast enterprise. During the 1970-71 school year there were 1,084,833 children enrolled in the public

schools in grades kindergarten through grade 12. 585,650 of these children were transported at one time or another by public school districts during the year. The average daily number of children transported during the year was 495,024. Thus 45.6% of the children attending public schools were transported. The total cost of transporting children by the Public School Districts was $33,028,006 and the average cost per pupils was $66.72. More than 7,000 vehicles were utilized in providing this transportation.

This massive dedication of public services and facilities for the protection of children in going to and from school has achieved phenomenal success. School bus transportation is the safest mode of transportation in the

nation. Facts accumulated by the National Safety Council reflect that in 1966 there were 2 1/2 fatalities per 100,000,000 passenger miles in automobiles and .04 fatalities per 100,000,000 passenger miles in school buses. The transportation of children by school bus is more than 60 times safer than transportation by private automobile.

A study by Charles D. Stout, Director of Safety Education, Jefferson County Schools, Louisville, Kentucky, supports the statistical fact that any child is 60 times safer in a school bus than in the family car. In the Louisville, Kentucky school bus system transportation is furnished to 70,000 children daily. Over a 20-year period not a single fatality or serious injury had been experienced on board a school bus.

Four children had been killed as pedestrians going between home and the bus stop.

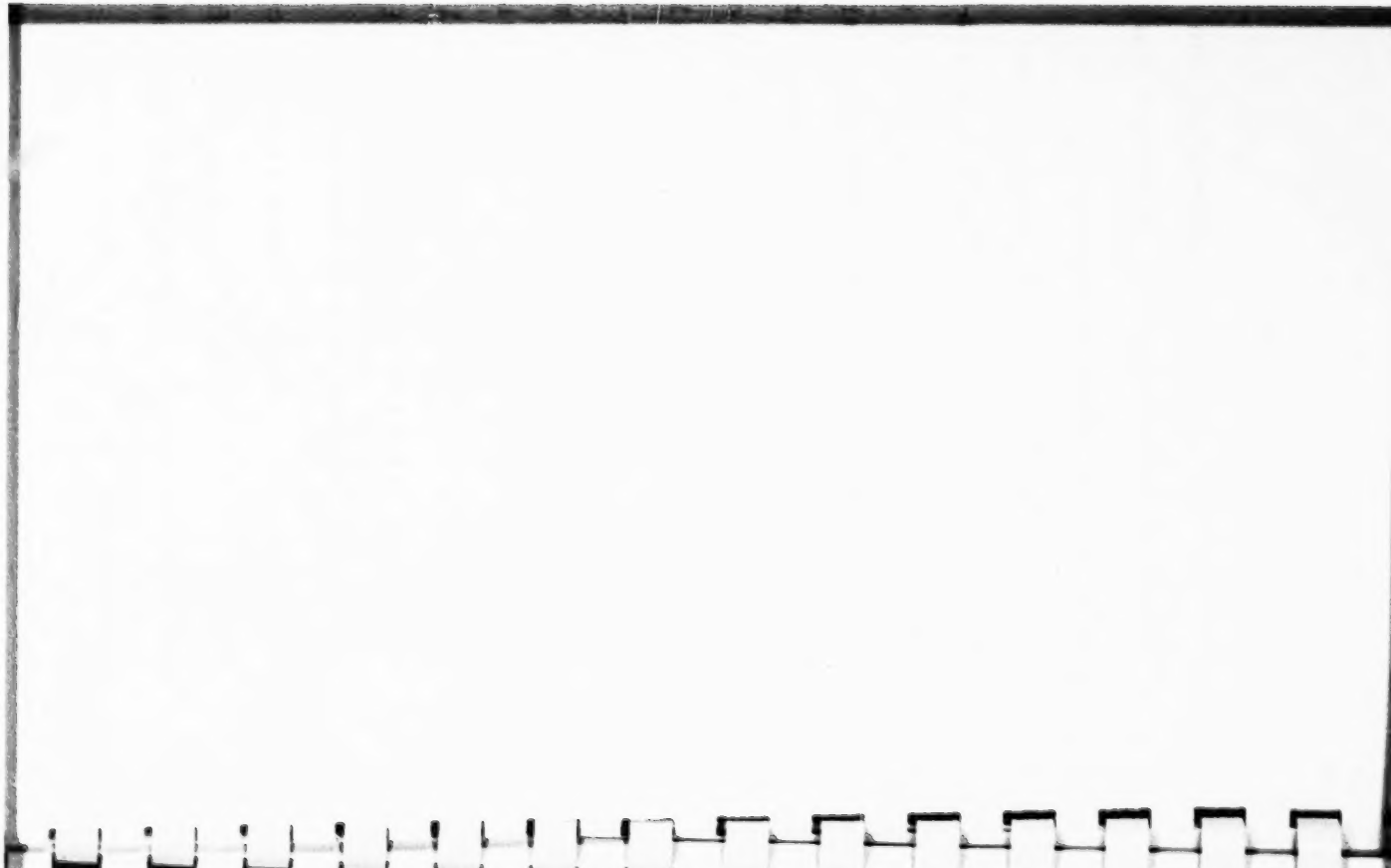
Dr. Robert Baldwin, Director of Special Services at the Safety Education Center, Central Missouri State College, Warrensburg, Missouri, an expert in the field of transportation of children to and from school, testified in regard to the impact of public services and facilities on the health, safety and welfare of children in going to and from school. In his opinion school bus transportation is a safer method for children to go to and from home and school than transportation by private family automobiles. School bus transportation is safer for the children than walking. Children who walk to school are exposed to dangers arising from vehicular hazards and from criminal

activity such as molestation, battery, kidnapping, robbery, etc. Children walking to school are exposed to cold, rain, snow, and other inclement weather conditions.

Dr. Baldwin stated that if children walk to school, generally, there is a direct relationship between the distance between home and school and the possibility of accident and injury. If the route which a child followed was across an open field then the distance travelled would not be significant in regard to the probability of accident and injury. However, if a child must walk on the unprotected right of way of a heavily-travelled road, distance is directly related to the probability of accident and injury. The number of intersections which a child must cross increases the probability of

accident and injury and generally the number of intersections increases the greater the distance travelled,

Dr. Baldwin further stated that the use of school buses for transportation reduces significantly the number of vehicles required to transport children to and from school. If all children who ride school buses were transported to and from school in private family automobiles, traffic on the public streets and highways would be increased significantly and traffic at the school site in discharging and picking up children would be greatly increased. Safety problems from traffic congestion at the school site would be seriously compounded. There is a direct relationship between the volume of traffic and traffic hazards. Generally increased traffic adds to traffic hazards and



increases the probability of accidents. These hazards are multiplied during inclement weather. The hazards in connection with picking up and discharging children at the school premises by private automobile are especially multiplied during inclement weather.

Dr. Baldwin's opinion that school bus transportation is a safer method of getting children to and from school than private family automobiles is also based upon the special equipment requirements which apply to school buses, the special licensing requirements for drivers, the special training given to drivers, and the special operating regulations applicable to school buses.

Dr. Baldwin stated that generally, paved sidewalks and paved pedestrian walkways increase safety for children who

must walk to and from school. This safety is also increased by traffic-control devices and pedestrian crosswalks.

Dr. Baldwin is of the opinion that school bus transportation is the safest mode of transportation in the nation.

Dr. Baldwin is of the opinion that there would be fewer injuries and fatalities to children in going to and from home and school if school bus transportation in the State of Missouri was available to all children who live one or more miles from school.

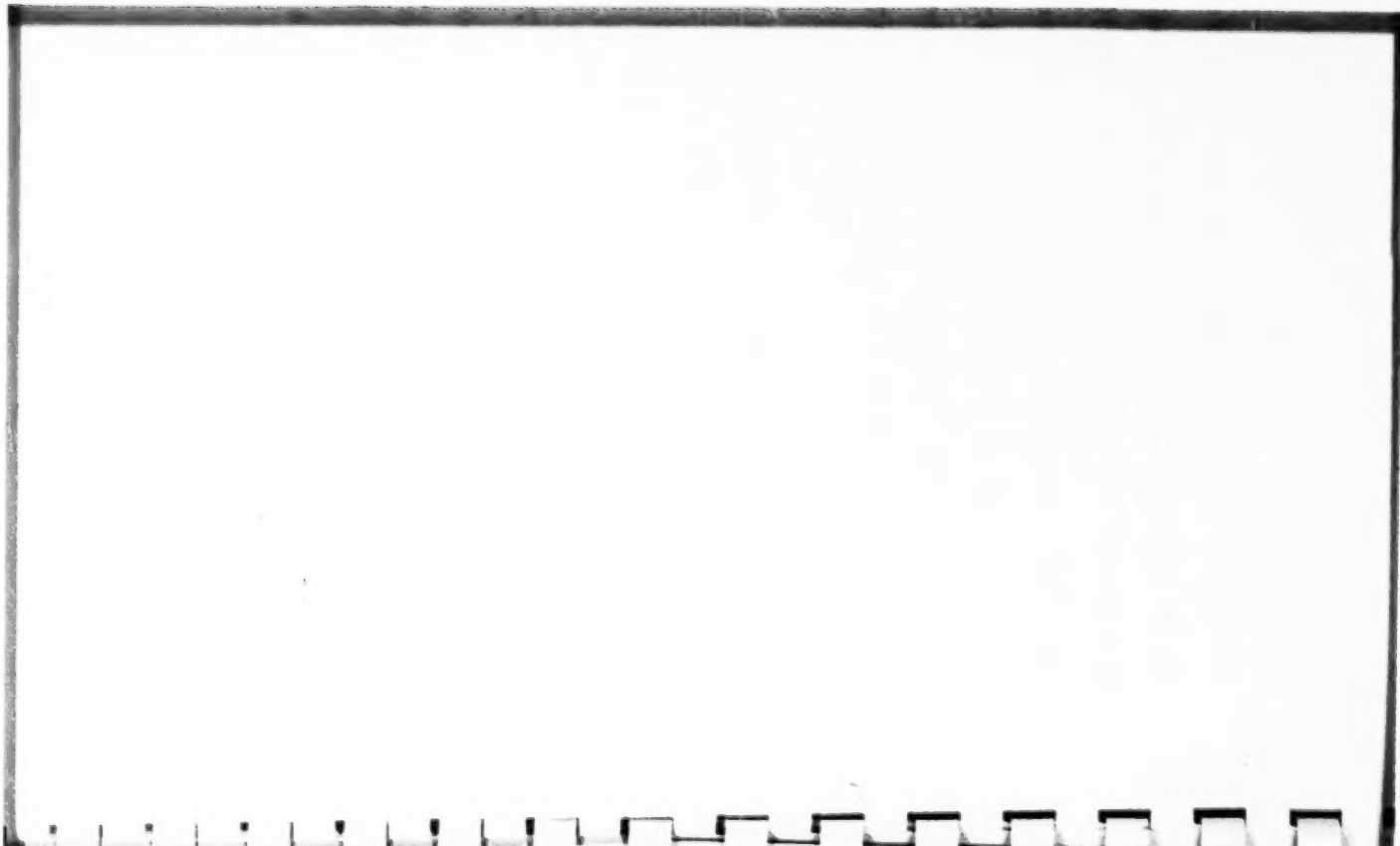
As noted above public services and facilities for the safe and expedient transportation of children to and from school is a massive coordinated state and local public effort.

The transportation of children to and from both public and non-public

schools at public expense is provided for in 27 states. The 1970-71 public school enrollment in these states was 30,759,554. The 1970-71 enrollment in Catholic schools in these states was 3,693,818. (Enrollment figures on other non-public schools for 1970-71 were not available to appellants' counsel).

Twenty-three states do not provide transportation at public expense for children going to and from non-public schools. The public school enrollment in these states for 1970-71 was 16,708,281. The 1970-71 enrollment in Catholic schools in these states was 624,978. (Enrollment figures on other non-public schools for 1970-71 were not available to appellants' counsel).

Thus almost ninety-nine per cent (98.8%) of all children in the United



States have transportation to and from school available at public expense.

The free transportation provided to children who attend Cole County R-III Public School aids the parents and guardians of those children in complying with the requirements of the Compulsory Attendance Law. This free transportation also relieves the parents and guardians of these children of the cost and expense of transportation to and from school. Urban Luetkemeyer and the parents and guardians of other children who attend St. Martins School are denied the benefit of free transportation in complying with the requirements of the Compulsory Attendance Laws and are burdened with the cost and expense of transporting their children to and from school.

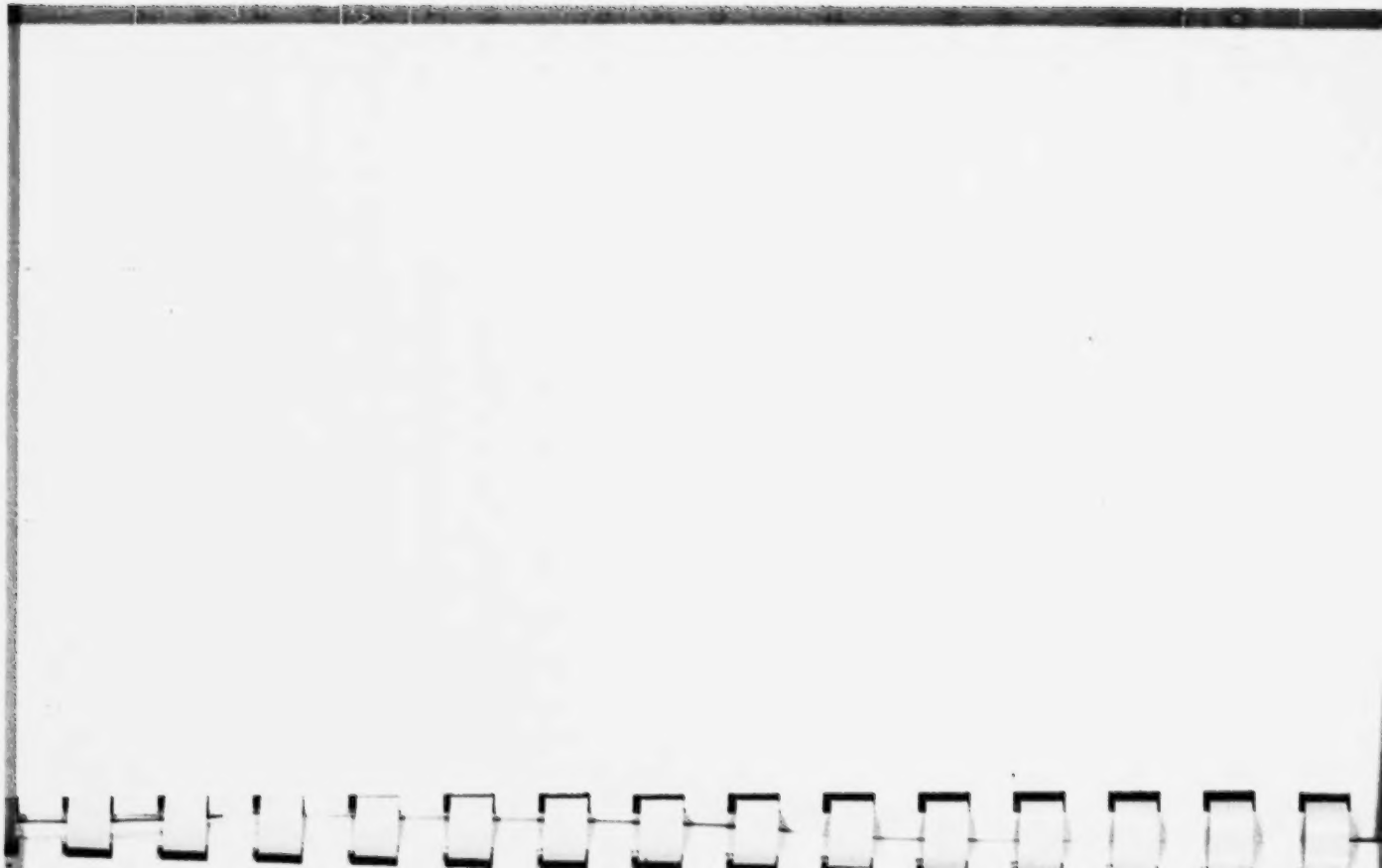
There were 134,593 children enrolled

in non-public schools in the State of Missouri during the 1969-70 school year. These are Catholic, Lutheran, Jewish, Seventh-Day Adventists, and others. Almost 95% of the children attending non-public schools are attending church-related schools.

The total expenditures for public, elementary, and secondary education in the State of Missouri in 1971 was approximately $875,300,000. If the same percentage of children attending non-public schools in Missouri would be eligible for transportation as the children attending public schools, (45.6%), the average daily number of children attending non-public schools to be transported would be 61,374. The estimated cost of transporting non-public school children in Missouri, based upon the average cost

of transporting public school children, would be $4,094,872 per year. The cost of transporting non-public school children to and from school would be less than 1/2 of 1%, (0.46%) of the total annual expenditure for public elementary and secondary education.

The Luetkemeyers, appellants herein, are members of the Catholic Church. It would violate the religious conscience of Ruban Luetkemeyer to send his children to public schools for their education as long as a Catholic church-related school is available on a day school basis for the education of his children. In the exercise of his parental judgment in directing the upbringing and education of his children, it is his judgment that the best interests of the education and upbringing of his children can be served

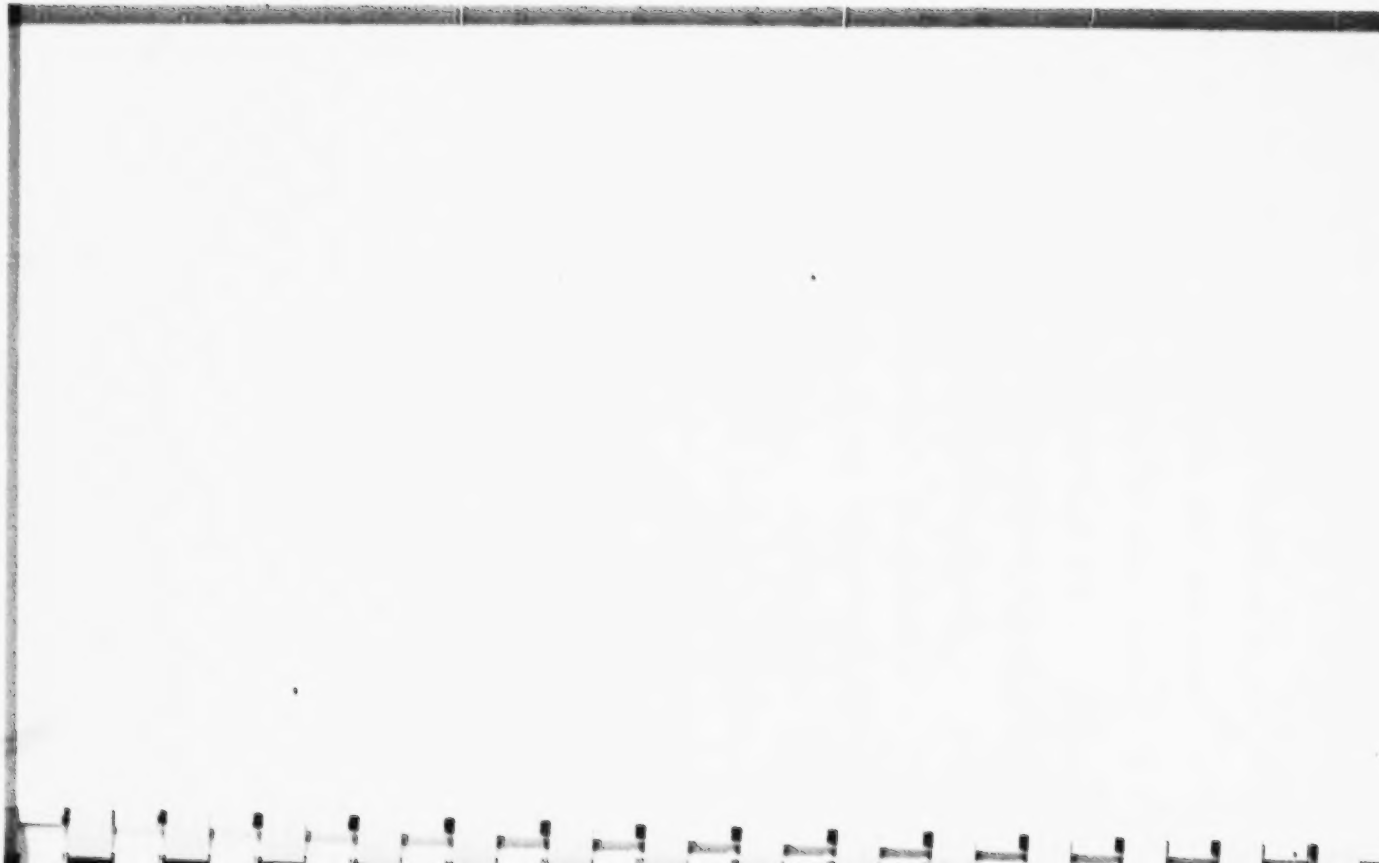


by attendance at St. Martins School rather than by attendance at the local public school.

It has been the public policy of the State of Missouri for many years to provide, as a public service and facility, transportation for children in going to and coming from school for the protection of the health, safety, and welfare of the children. The public policy is funded by public school moneys. The Supreme Court of the State of Missouri in McVey v. Hawkins, 364 Mo. 44, 258 S.W. 2d 927 (1953) held that public transportation for children going to and coming from church-related parochial schools was contrary to Article IX Section 5 of the Constitution of the State of Missouri which requires that the Public School Fund be " * * *

appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

The Luetkemeyers contend in this case that transportation for children to and from school at public expense is a public benefit which must be available to all persons on a nondiscriminatory basis. They claim that a public policy which has as its purpose the protection of the health, safety and welfare of children generally in going to and coming from school cannot be limited in its application to children who attend public schools. They claim that a public policy which has as its further purpose the assistance to parents and children in complying with the Compulsory School Attendance Law cannot be limited in its benefits to children and parents of



children who attend public schools only. The various constitutional questions arise by reason of the denial to the Luetkemeyer children and their parents of the protection and assistance of benefits, services, and facilities which purport to be available to the public generally.

The Luetkemeyers contend that their basic civil rights are violated in denial to them of these public services and facilities.

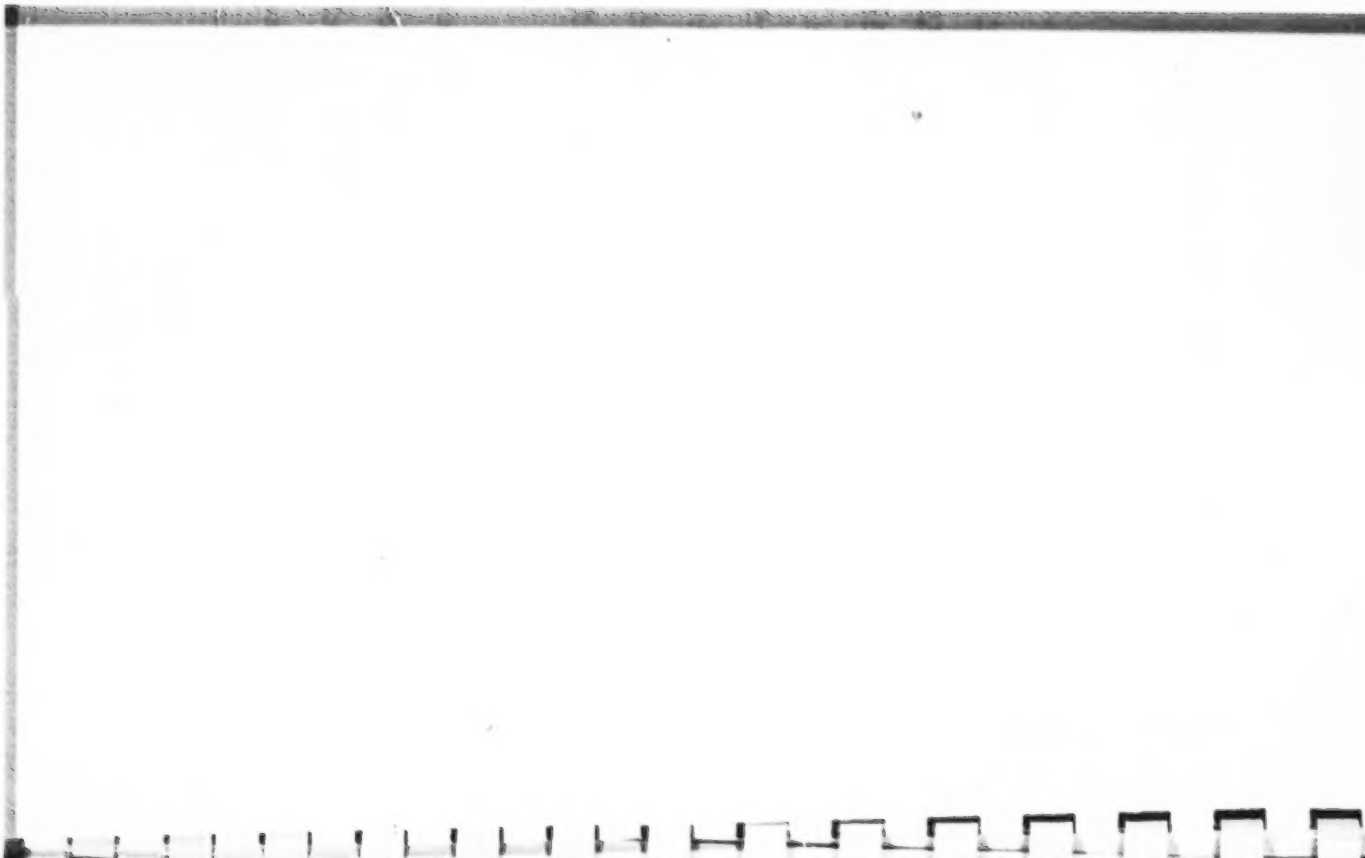
They contend that the Opinion and Judgment of the majority in the court below is erroneous and that they are entitled to the relief sought as articulated in the dissenting opinion of Judge Gibson.

THE QUESTIONS ARE SUBSTANTIAL

1.

Do the statutes of the State of Missouri which provide for the transportation at public expense of children to and from home and school establish, in the exercise of the police powers, public services and facilities for the protection of the health, safety, and welfare of children which must be available to all persons on a nondiscriminatory basis?

This is a question of first impression before this court. Appellants seek to enjoy on an equal basis with all other citizens public services and facilities which are in the nature of police protections established by the state to promote the general well being of the



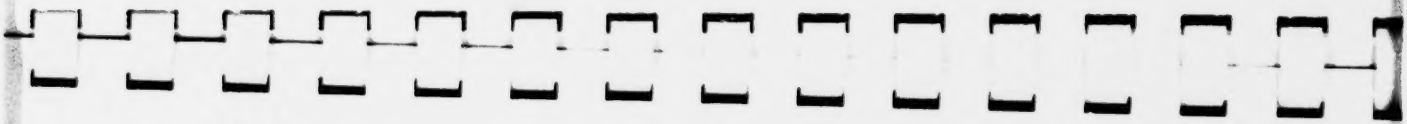
people. Appellants have a fundamental right to be protected by the state on an equal basis with their fellow citizens. A denial to them of protective services and facilities violates their basic civil rights.

The complaint of the lower court was carefully drafted to require a decision by the court as to whether or not these public services and facilities constitute general governmental services for the health, safety, and welfare of children. A vast amount of evidence was accumulated and submitted to the court in support of appellants' petition. The majority opinion of the court below recognized the question, stated much of the evidence in regard thereto, but avoided any definitive conclusion on the question. Although the majority opinion made no specific finding in regard to

the question, its conclusions of law treated these public services and facilities as an educational service rather than as police measures for the protection of children.

Appellants make no claim of entitlement to educational services in the exercise of their right to attend a non-public school. Appellants vigorously assert a claim to police protections on a non-discriminatory basis with their fellow citizens.

It is firmly established in our jurisprudence that the transportation of children to and from school at public expense, in fact and in law, is for the health, safety and welfare of children. Almost a quarter of a century ago this court reviewed the facts relating to the transportation of children to and from



school and declared as a matter of law that it is the purpose of such transportation to help parents get their children safely and expeditiously to and from school; Everson v. Board of Education, 330 U.S. 1. In this regard the court stated, l.c. 17 and 18:

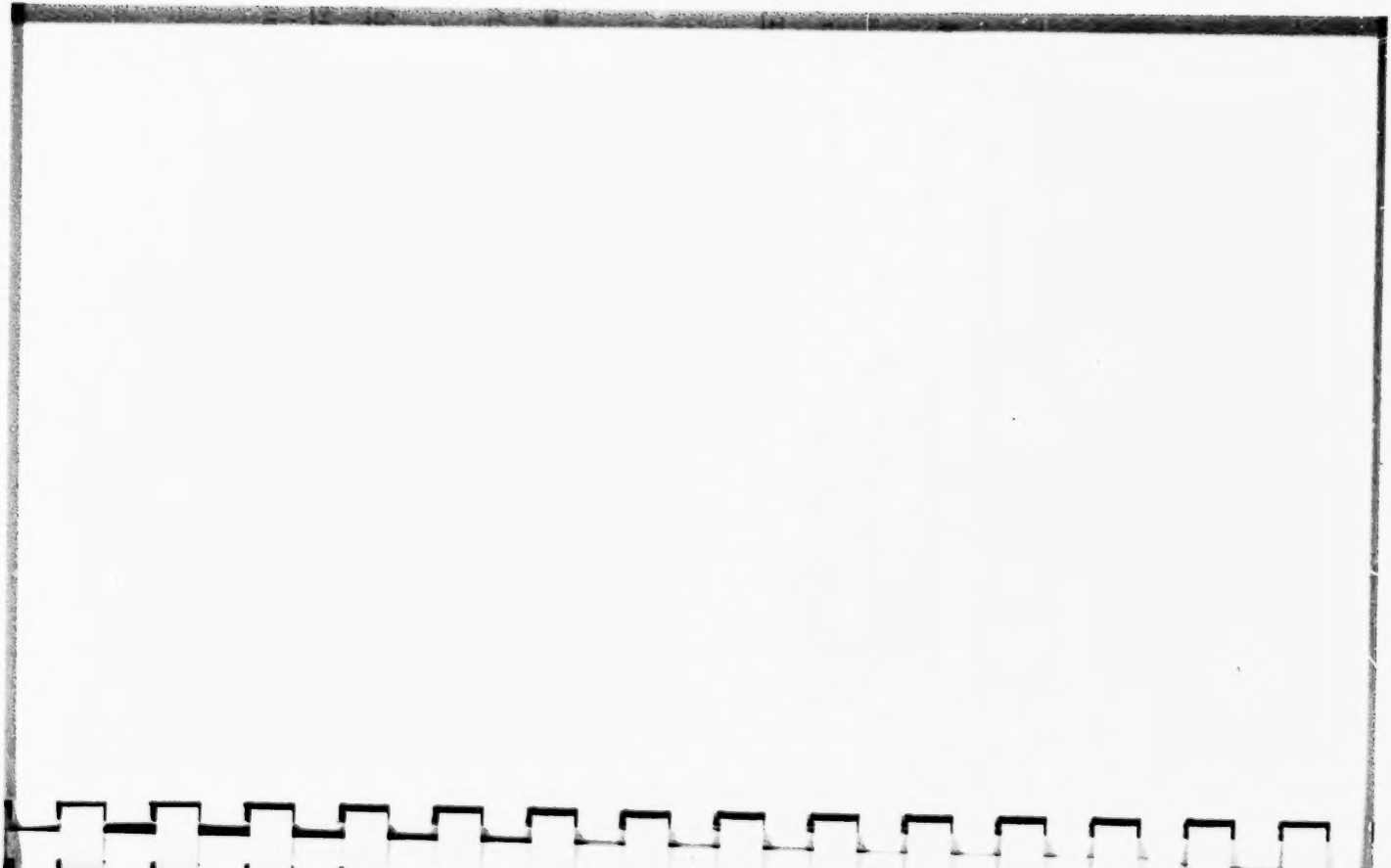
> "Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policeman. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general governmental services as ordinary police and fire protection, connections for sewage

disposal, public highways and sidewalks * * * "

Many appellate courts in various states have enunciated and amplified upon the sound logic expounded in the Everson case as to the purpose of legislation which provides for the transportation of children to and from school; Americans United Inc. etc. v. Ind. School District etc. (1970) 179 N.W. 2d 146, appeal dismissed, U.S.S. Ct. Nos. 934-935, 6/28/71, 403 U.S. 945; Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 A. 628; Adams v. County Com'rs. of St. Mary's County, 180 Md. 550, 26 A. 2d 377; Bowker v. Baker, 73 Cal. App. 2d 653, 167 P. 2d 256; Nichols v. Henry, 301 Ky 434, 191 S.W. 2d 930; Snyder v. Town of Newtown, 147 Conn. 374, 161 A. 2d 770; Rhoades v. Abington

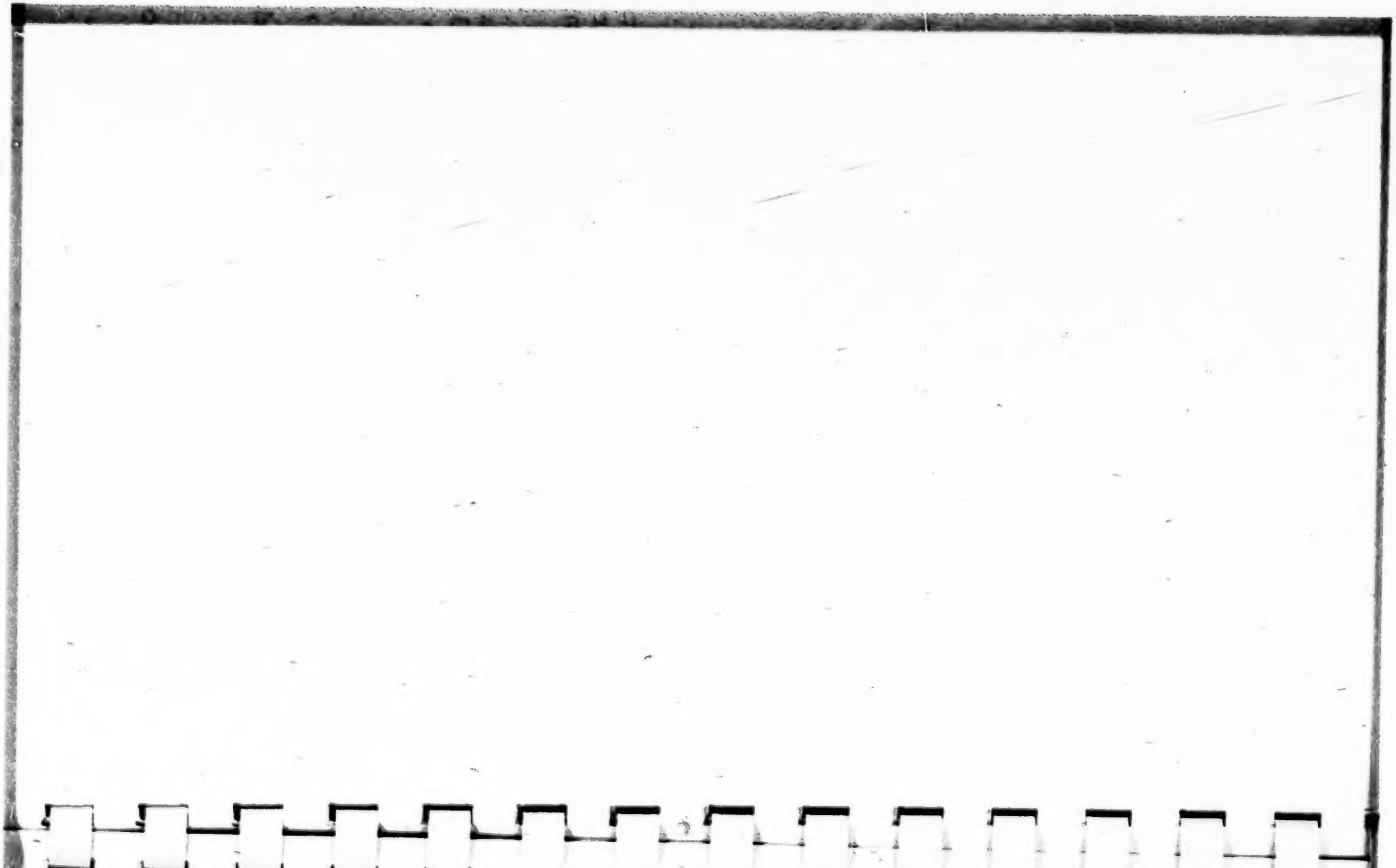
Township school District, 424 Pa. 202, 226 A. 2d 53; Alexander v. Bartlett, 14 Mich. App. 177, 165 N.W. 2d 445; State ex rel. Hughes v. Board of Education of Kanawha County, W.Va., 174 S.E. 2d 711, U.S. St. Ct. No. 517, 6/28/71 cert. denied, appeal dismissed, 403 U.S. 944; West Morris Regional Board of Education v. Sills, 279 A. 2d 609, U.S.S. Ct. No. 71-420, 12-7-71 Cert. Denied, 404 U.S. 986.

It will be noted that three of the above cases were summarily upheld by this court within the last three years. In one of these recent cases, State ex rel. Hughes v. Board of Education of Kanawha County, supra, the Supreme Court of West Virginia in discussing the purpose of school bus transportation stated, 174 S.E. 2d l.c. 718:



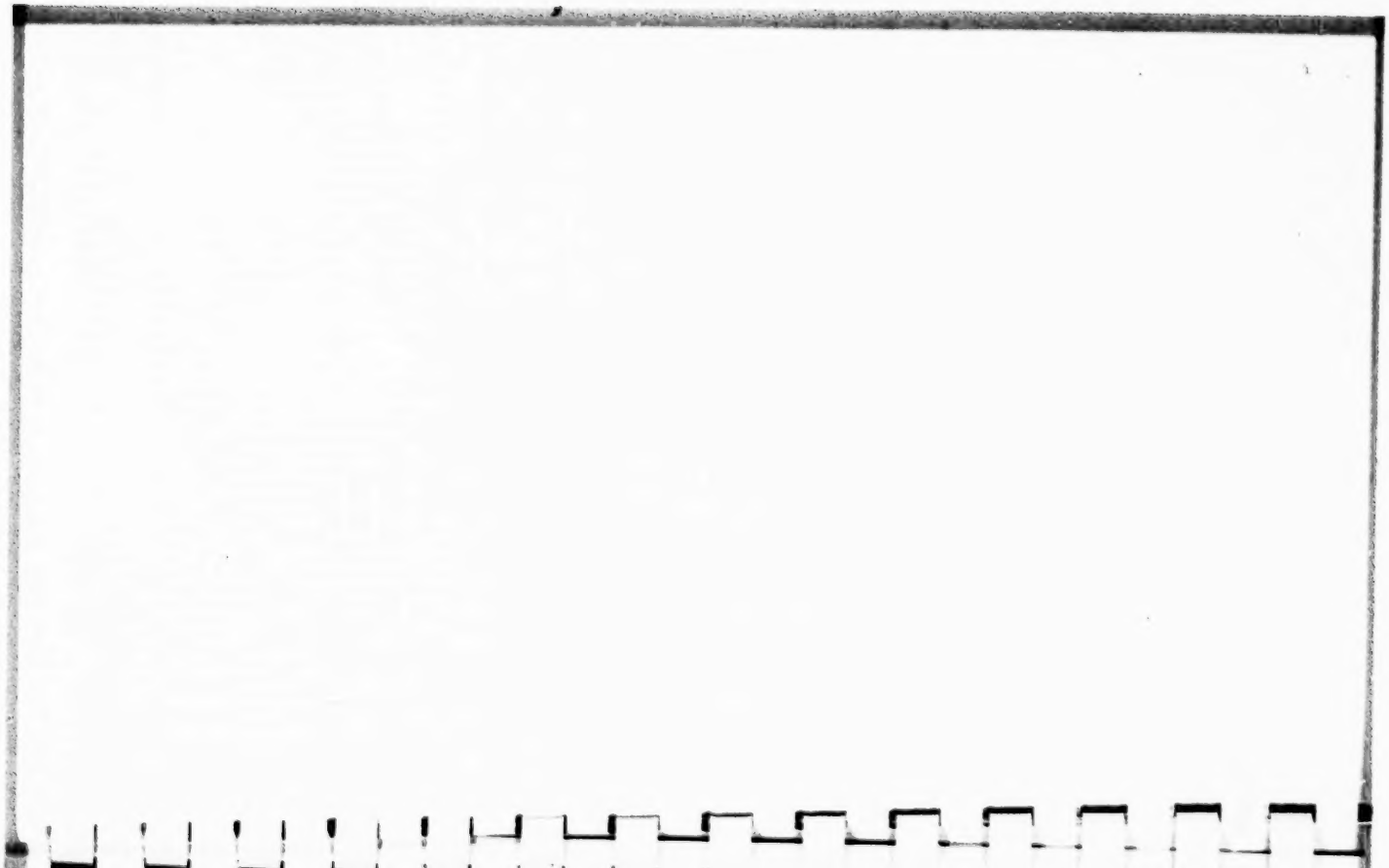
" * * * we are concerned in these cases with the rights of children of school age, as citizens, in going to and returning from school. We are concerned with children of school age who are on public sidewalks, streets, or highways, in their role as private citizens, in going to and returning from primary or secondary schools in obedience, in most instances, to the stern command of laws pertaining to compulsory school attendance * * *"

"School buses owned and operated by county boards of education are, in a great measure at least, maintained and operated in order to protect the health, safety and welfare of the students who are transported thereon. Numerous statutes and traffic regulations are designed to afford a special degree of safety to children transported on public school buses. The buses protect the children from all sorts of inclement weather, including rain, snow and sleet. By the system of bus transportation maintained by county boards of education, children are protected, in a great measure, from many of the dangers incident in this day, to travel on public streets, sidewalks and highways arising from



> vehicular traffic hazards and from molestation, personal violence, kidnapping or other harm of a criminal character."

There are more than 50,000,000 children attending school in this country. Of all these children approximately 625,000, only 1.2%, are denied transportation on a nondiscriminatory basis because they attend a non-public school. Twenty-five years ago Everson declared that the elimination of hazards to the health and safety of children was the purpose of transportation. The record in this case reflects that this purpose is being accomplished to the highest degree. The conclusion is irrefutable that in fact and in law the purpose and effect of transportation is for the protection of the health, safety, and welfare of children in going to and from

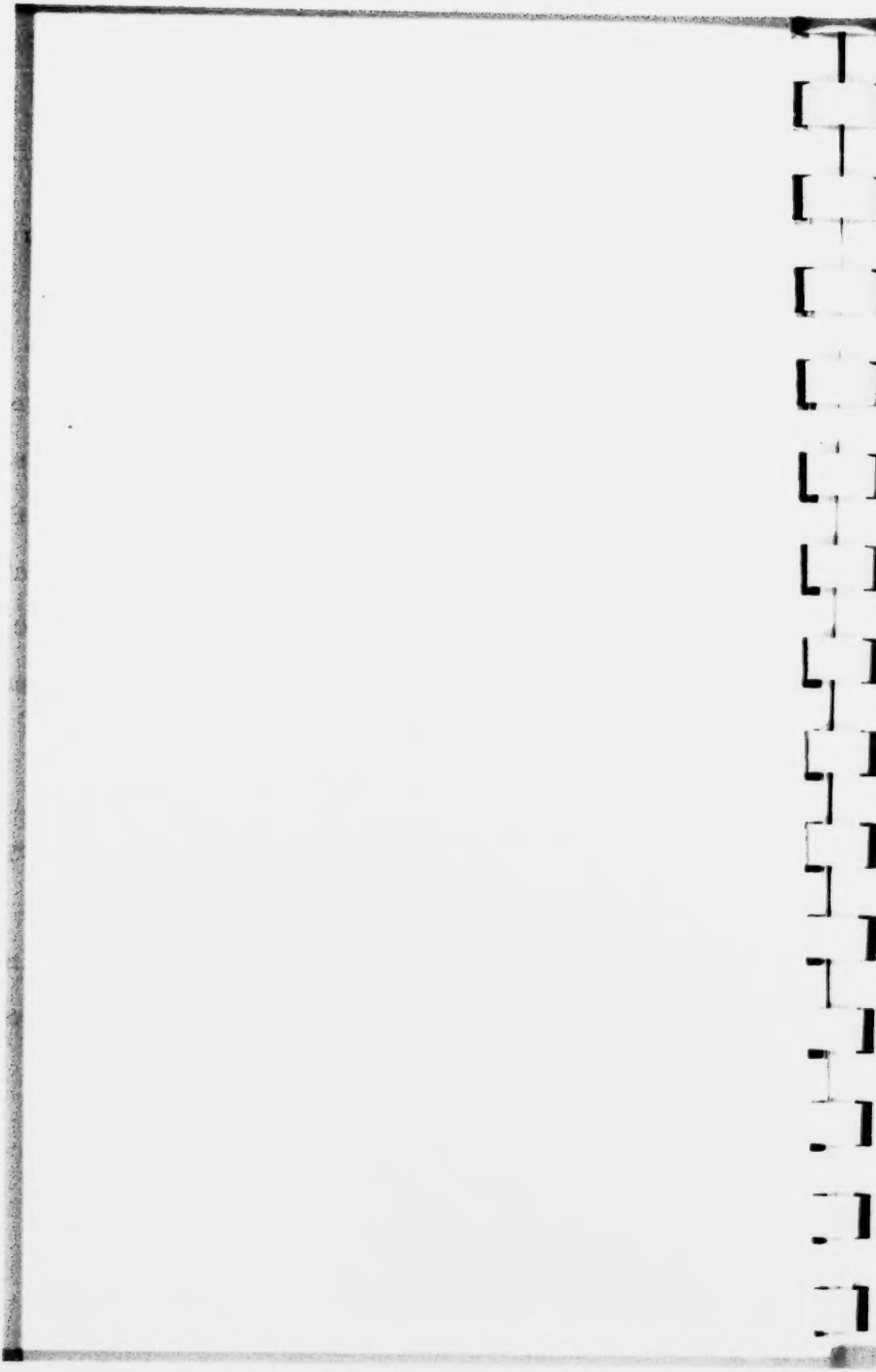


school.

In this case the defendants have contended that transportation is an educational service.

The enjoyment of public services and facilities cannot be lawfully denied to a class of citizens by the official designation of such services as educational services. Appellants do not deny that the cause of education is benefited through an official program of transportation of school children. The children will arrive at school without injury, in good health and without fatigue. Thus the physical and mental state of the child is more conducive to the educational process. The same reasoning applies to nutritious food, comfortable sleeping quarters, protective clothing, affectionate and protective parents, and endless

necessities, comforts and conveniences to the person. Yet will anyone argue with a straight face that the legislature or the courts may lawfully declare that groceries, beds, shoes and the wise administration of the divorce courts are educational services? Can the state make groceries, clothing, bedding and protections against cruel and indifferent parents available to children attending public schools and deny the same benefits to children attending non-public schools by designating these things as educational services? Can the state place the administration of its program for aid to dependent children in the hands of the State Department of Education, designate such program as an educational service, and limit the benefits of the program to children attending public schools? Can



the state designate police protection as an educational service, place its administration under the State Department of Education and refuse to protect children attending non-public schools from criminal activity? Can the state designate its public roads as an educational service and refuse to allow children attending non-public schools the use and benefit of the roads? Can the state designate public sewers as an educational service and disconnect a school such as St. Martins with 200 children in attendance because it is a non-public school?

In determining the legal purpose and effect of the transportation of school children the basic nature of the service is not subject to change by legal fiat. Only 1.2% of the children in this country do not have this service avail-

able on a nondiscriminatory basis by reason of artificial legal roadblocks. Appellants simply seek for this court to call a bus a bus and to remove the invidious discrimination which results to them by designating a bus a school. Everson on the Supreme Court level and the overwhelming authority of the states has percieved the true nature of such transportation and has equated this transportation with the basic police protections enumerated by appellants in the previous paragraph. These analogies, although appearing frivolous, demonstrate that the true nature of such transportation cannot be changed by a fallacious designation.

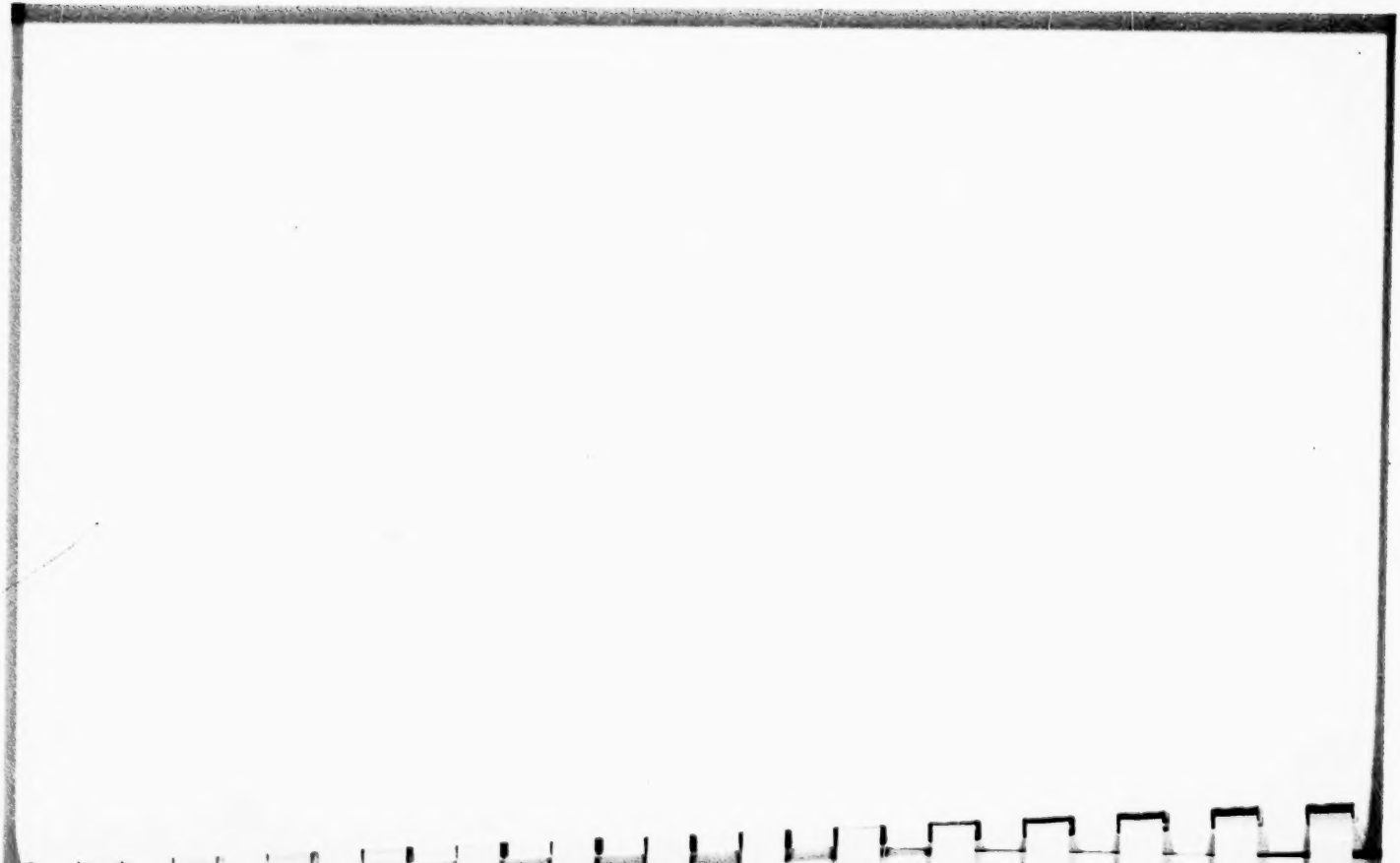
The State of Missouri has not designated the transportation of school children as an educational service and such a

conclusion cannot be supported by the law and facts in this case.

II.

Do appellants have a fundamental right to the use and benefit of fundamental services and facilities offered by the state for the health, safety, and welfare of children?

As noted above Everson and the cases following it have equated the transportation of children to and from school with basic police and fire protection and other basic governmental services extended in the exercise of state's police power for promoting the general well being of the people. Appellants claim that they have a fundamental right to the use and benefit of these public services and facilities



on a nondiscriminatory basis with all other citizens. Citizens, in the exercise of their constitutional rights, are entitled to police protection. In Williams v. Wallace, (1965), M.D. Ala.), 240 F. Supp. 100 the court applied this principle as follows, l.c. 109:

> "These plaintiffs and the members of the class they represent are entitled to police protection in the exercise of their constitutional right to march along U.S. Highway 80 from Selma to Montgomery, Alabama. Hague v. C.I.O. (1939), 307 U.S. 496, 59 S. Ct. 954, 83 L.ed 1423; Kelly v. Page (5th Cir. 1964), 335 F. 2d 114; Downie v. Powers (10th Cir. 1951), 193 F.2d 760; U.S. v. Klans (M.D. Ala. 1961), 194 F. Supp. 897. They are entitled to be protected by the law enforcement agencies of the State of Alabama against traffic and other hazards. * * *"

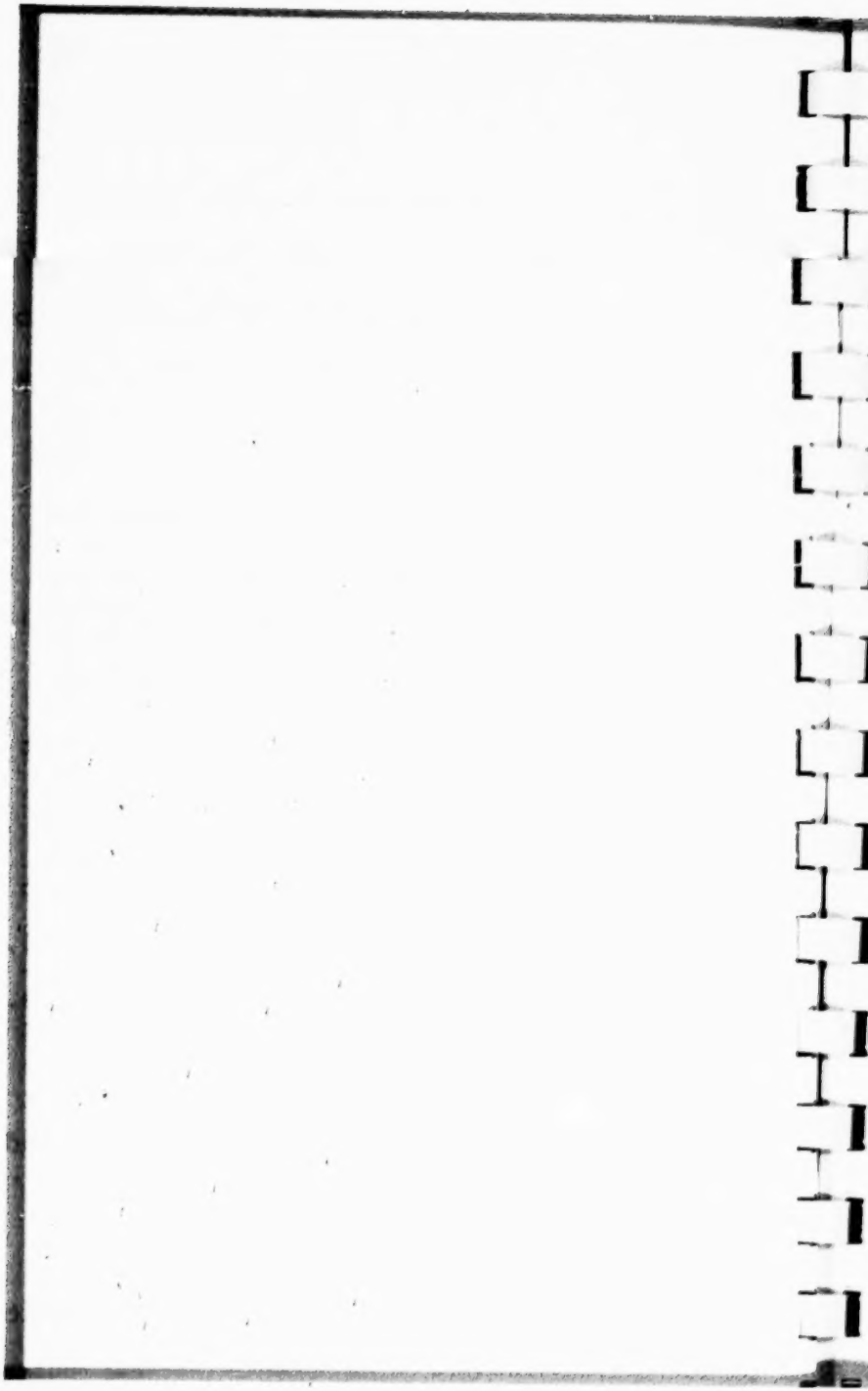
see also

Cottonreader v. Johnson (M.D. Ala. 1966), 252 F. Supp. 492, Lynch v. U.S. (5th Cir. 1951), 189 F. 2d 476, 342 U.S. 831.

This court has held in Brown v. Louisiana, (1966), 383 U.S. 131 that public facilities must be available to all on a nondiscriminatory basis. The court stated, l.c. 143:

> "A state or its instrumentality may, of course, regulate the use of its libraries or other public facilities but it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all. It may not do so as to some and not as to all. It may not provide certain facilities for whites and others for negroes. And it may not invoke regulations as to use - whether they are ad hoc or general - as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights. Cf. Wright v. Georgia, supra, at 293."

Appellants do not claim that the states must provide public services and facilities for the transportation of children to and from school. However, there is a nationwide program coordinated



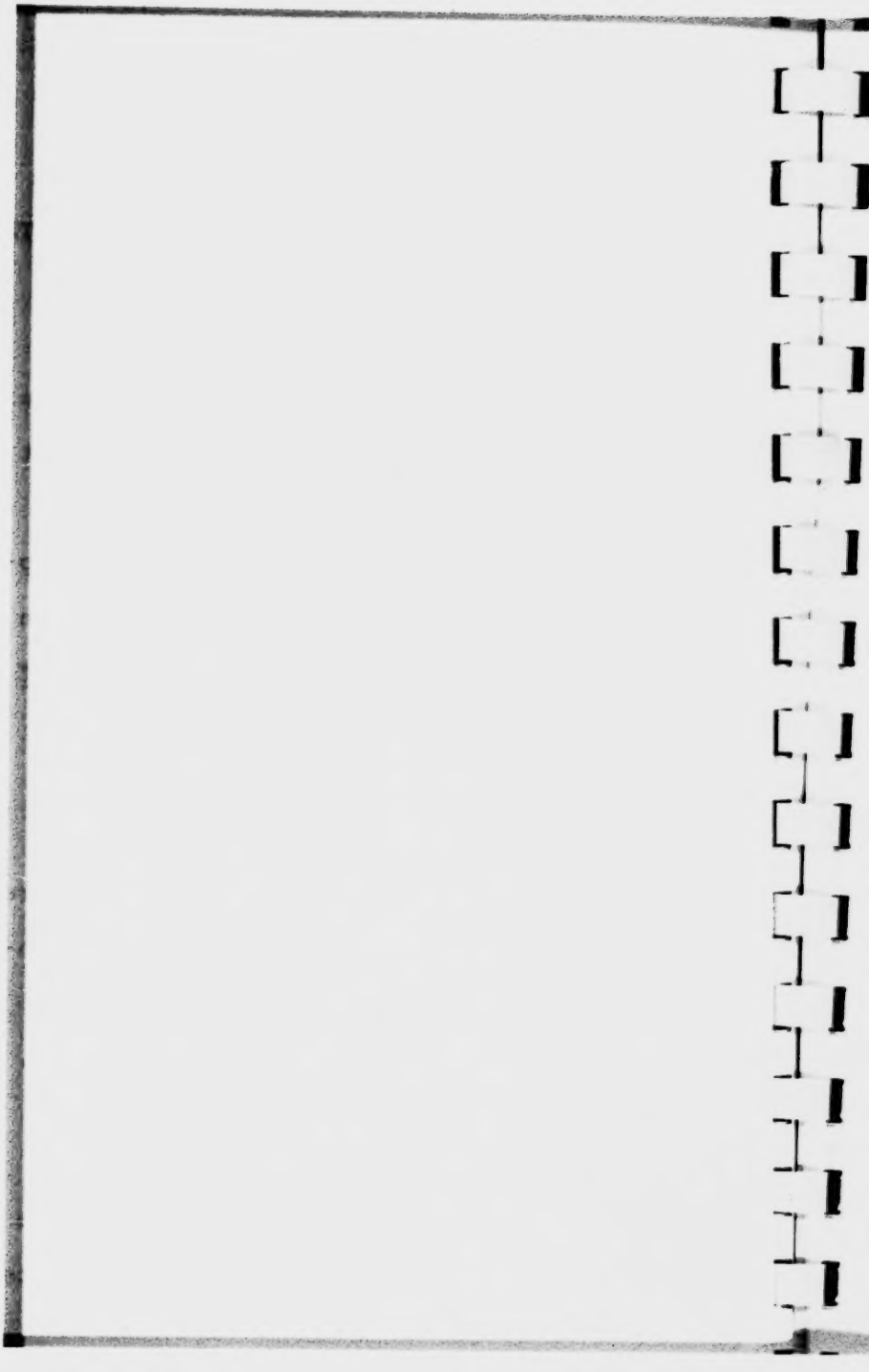
on the national, state and local level to protect the health, safety, and welfare of children by providing transportation at public expense to and from school and the State of Missouri has instituted a program which participates in this well-coordinated effort. Appellants claim a fundamental right to the use and benefit of these public services and facilities on a nondiscriminatory basis with their fellow citizens.

III.

Does the transportation of children at public expense to and from home and school serve the further purpose of enabling and assisting parents and children in complying with the Compulsory School Attendance Law?

Section 167.031 RSMo 1969 is the Missouri Compulsory Attendance Law. The law compels children to attend school and provides for criminal sanctions against parents who do not require their children to attend schools. Appellant Urban Luetkemeyer, in the exercise of his fundamental right to direct the upbringing and education of his children as recognized in Pierce v. Society of Sisters, 268 U.S. 510 has selected a non-public school for the education of his children. Attendance at the non-public school satisfies the requirements of the Missouri Compulsory Attendance Law.

In Everson v. Board of Education, supra, the court recognized that laws providing for the transportation of children to and from school serves the additional purpose of assisting parents



in complying with the Compulsory Attendance Law. The cases from the state courts cited on page 40 of this brief follow Everson in declaring that transportation to and from school has the additional purpose of enabling and assisting parents and children in complying with compulsory attendance statutes. Appellants are entitled to the benefits of these public services and facilities on a nondiscriminatory basis with their fellow citizens.

IV.

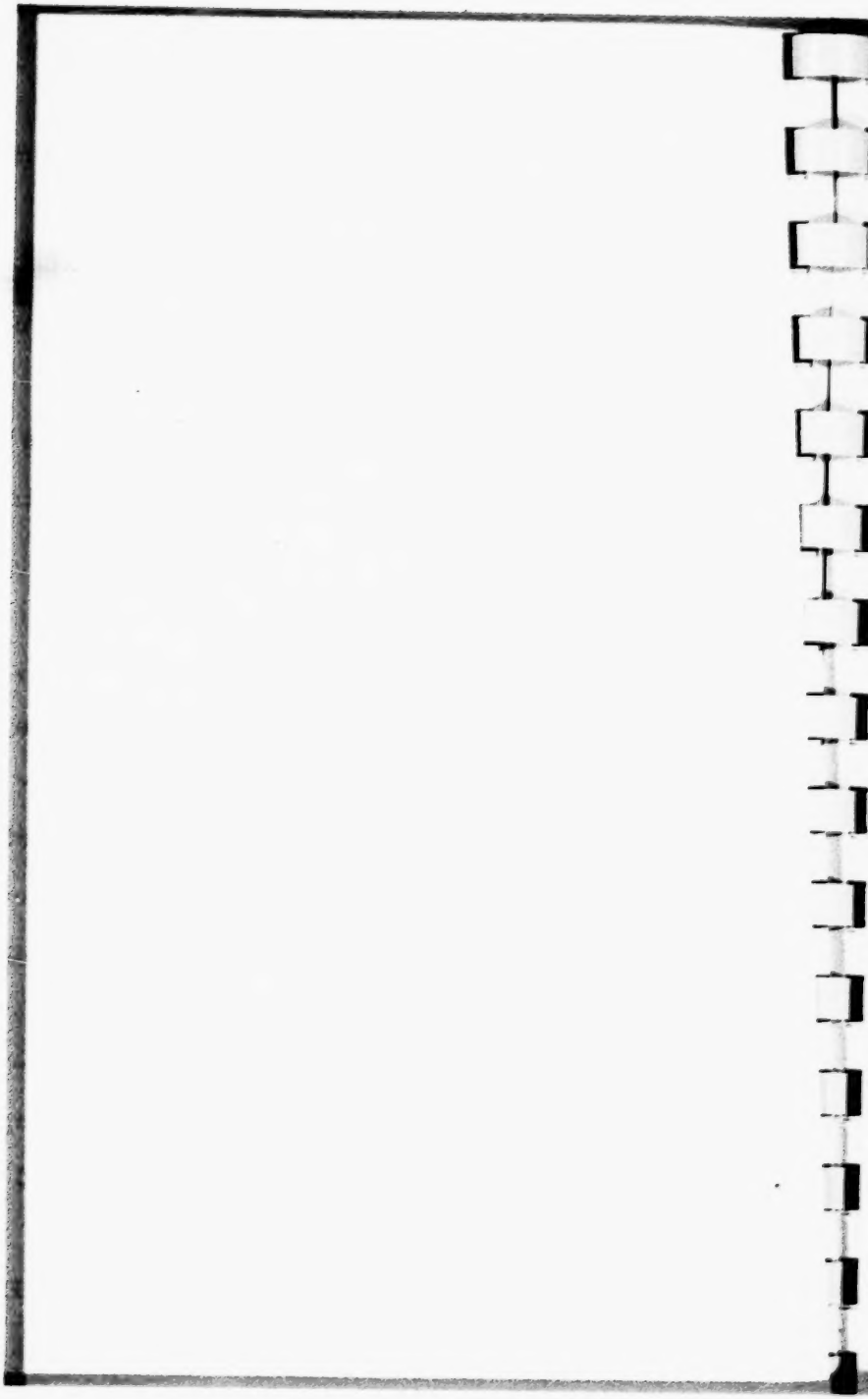
Does the refusal of appellees to allow appellants to avail themselves of the public benefit and the public services and facilities of the school bus transportation operated and maintained by defendants at public expense, in going

to and from appellants' home and a non-public school, constitute invidious discrimination against appellants and deny to appellants the equal protection of the laws as guaranteed to appellants by the 14th Amendment to the United States Constitution?

It has been demonstrated above that the primary purpose of the transportation of children to and from school is for the protection of the health and safety of the children and to assist the parents and guardians of the children in complying with the Compulsory Attendance Law. School bus transportation concerns fundamental governmental services and facilities offered under the exercise of the police powers to promote the general well being of the people. A limitation of these fundamental governmental services to

children attending public schools and the exclusion of these fundamental governmental services to children attending non-public schools constitutes invidious discrimination against the children attending non-public schools.

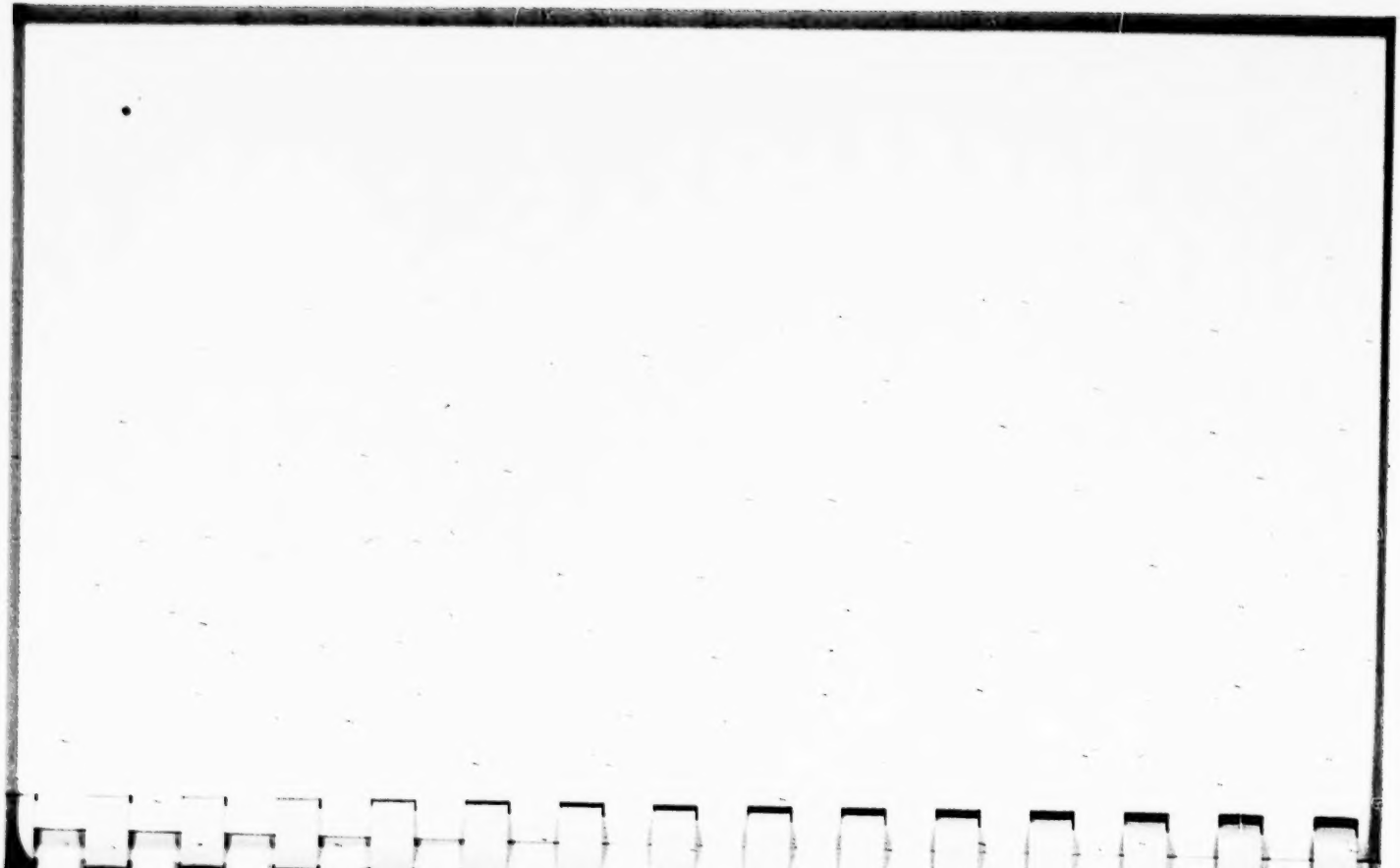
The term "invidious discrimination" seems to have found its way into our jurisprudence in Skinner v. Oklahoma, 316 U.S. 535, 541-542, 86 L. Ed. 1655, 1660, 62 S. Ct. 1110. In that case an Oklahoma statute provided for the mandatory sterilization of persons convicted of certain criminal offenses. A fundamental right of the class of persons subject to the mandate was involved which the court found to be an invidious discrimination of civil rights. The concept of invidious discrimination was applied to racial discrimination in Brown v. Board of Education, 347 U.S. 483, 98 L.Ed.



873, 74 S. Ct. 686; to voting rights in legislative apportionment cases in Reynolds v. Sims, 377 U.S. 533, 12 L. Ed. 2d 506, to the right of a bastard to sue for wrongful death of a mother in Levy v. La., 391 U.S. 68, 20 L. Ed. 2d 436 and to one-year residency requirements for welfare aid recipients in Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed. 2d 600.

The courts generally have determined invidious discrimination to exist from the facts before it in a particular case. In Sanders v. Gray, D.C. Ga., 203 F. Supp. 158, 168 the court stated invidious means tending to excite odium, ill will, or envy, or likely to give offense.

The public policy of the State of Missouri under which the health, safety and welfare of children is protected through transportation to and from schools



which limits the protections afforded thereby to children attending public schools constitutes invidious discrimination against plaintiffs. The exposure to the burdens and evils which transportation of school children is intended to remedy is equal regardless of the school attended by the child. The basic requirements for security of the person are the same. Such discrimination constitutes a denial to plaintiffs of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

An identical question was decided in State ex rel. Hughes v. Board of Education of the County of Kanawha, et al., supra. In the cited case plaintiffs brought suit in mandamus to require the transportation of their children by the public school district to and from

plaintiff's home to a non-public Catholic parochial school.

In the West Virginia case the court found that school bus transportation served the purpose of protecting the health, safety and welfare of the school children. It then concluded as follows, 174 S.E. 2d 711, l.c. 718:

> "We are of the opinion, therefore, that, in these two cases, a danial to parochial school children of all right to the benefit of the facilities of transportation on buses, maintained and operated for the transportation of public school children by the respective county boards of education, denies to the Catholic parochial school children and their parents the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States."

The court issued its mandamus requiring the transportation to and from school of children attending public and non-public schools on a nondiscriminatory

basis. As noted previously in this brief, certiorari was denied on appeal to this court. See also In re Proposal C, Mich. 1971, 185 N.W. 2d 9, l.c. 27 - 29; and State ex rel. Sch. Dist. Nebraska St. Bd. of Ed., 195 N.W. 2d 161, Cert. Denied, 409 U.S. 921.

In the case at bar the school bus carrying children to the public school passes the Luetkemeyer children, proceeds past the Luetkemeyer's parochial school, and deboards the public school children at their school. Most of the children who attend St. Martins School and who live one mile or more from the school are on the bus routes of a public school. In his dissenting opinion, after noting the above facts, Judge Gibson stated, (Appendix to Jurisdictional Statement, p. 60):

" * * * The children are all

> citizens of the same state and country. Their parents all pay the same burdensome taxes imposed on citizens generally, and yet, because of their attendance at privately accredited schools, the Luetkemeyer children walk or use private transportation while others ride at public expense. The discrimination is patent, invidious, and somewhat odious. * * *"

It has been amply demonstrated that the refusal of public transportation services and facilities to plaintiffs because their use of such facilities would be to go and come between home and a non-public school constitutes invidious discrimination against plaintiffs. The cases cited from the Supreme Courts of West Virginia, Michigan, and Nebraska reflect an awakening to discriminatory practices against children attending non-public schools in regard to general governmental services. Transportation services bear a much more direct

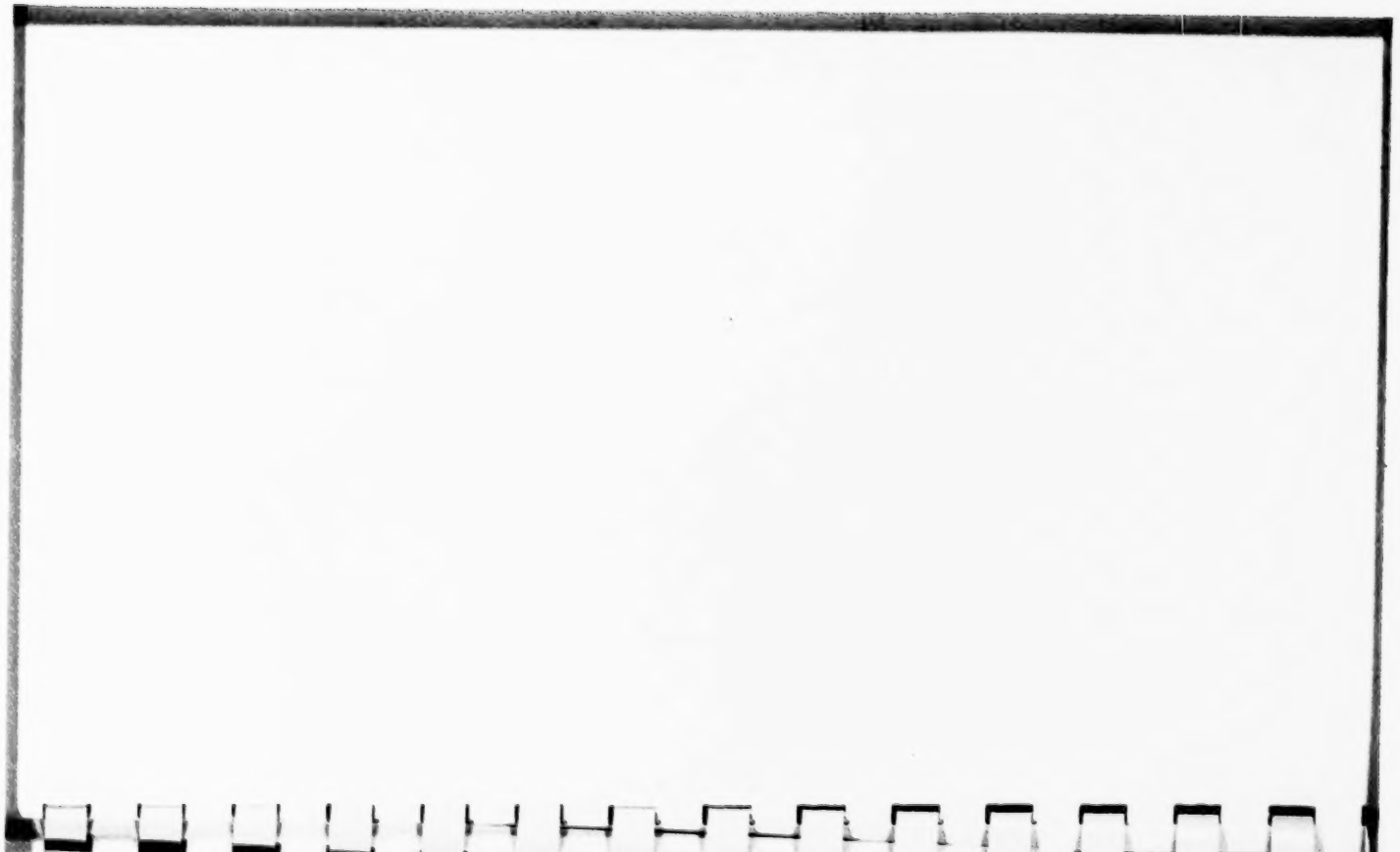
and immediate impact on the health and safety of children than the services which the Michigan and Nebraska Supreme Courts found to be within the protection of the Fourteenth Amendment. The facts in the record reflect that the vast majority of the school children throughout the country are offered the availability of transportation to and from school. Only 1.2% of the children in the country are denied the availability of school bus transportation. Such gross discrimination is invidious and is contrary to the equal protection of the laws guaranteed by the Fourteenth Amendment.

V.

Do the statutes of the State of Missouri which provide transportation to and from school to children attending

public schools and which deny said transportation to children attending non-public schools interfere with plaintiff Urban B. Luetkemeyer in the exercise of his fundamental right to direct the upbringing and education of his children?

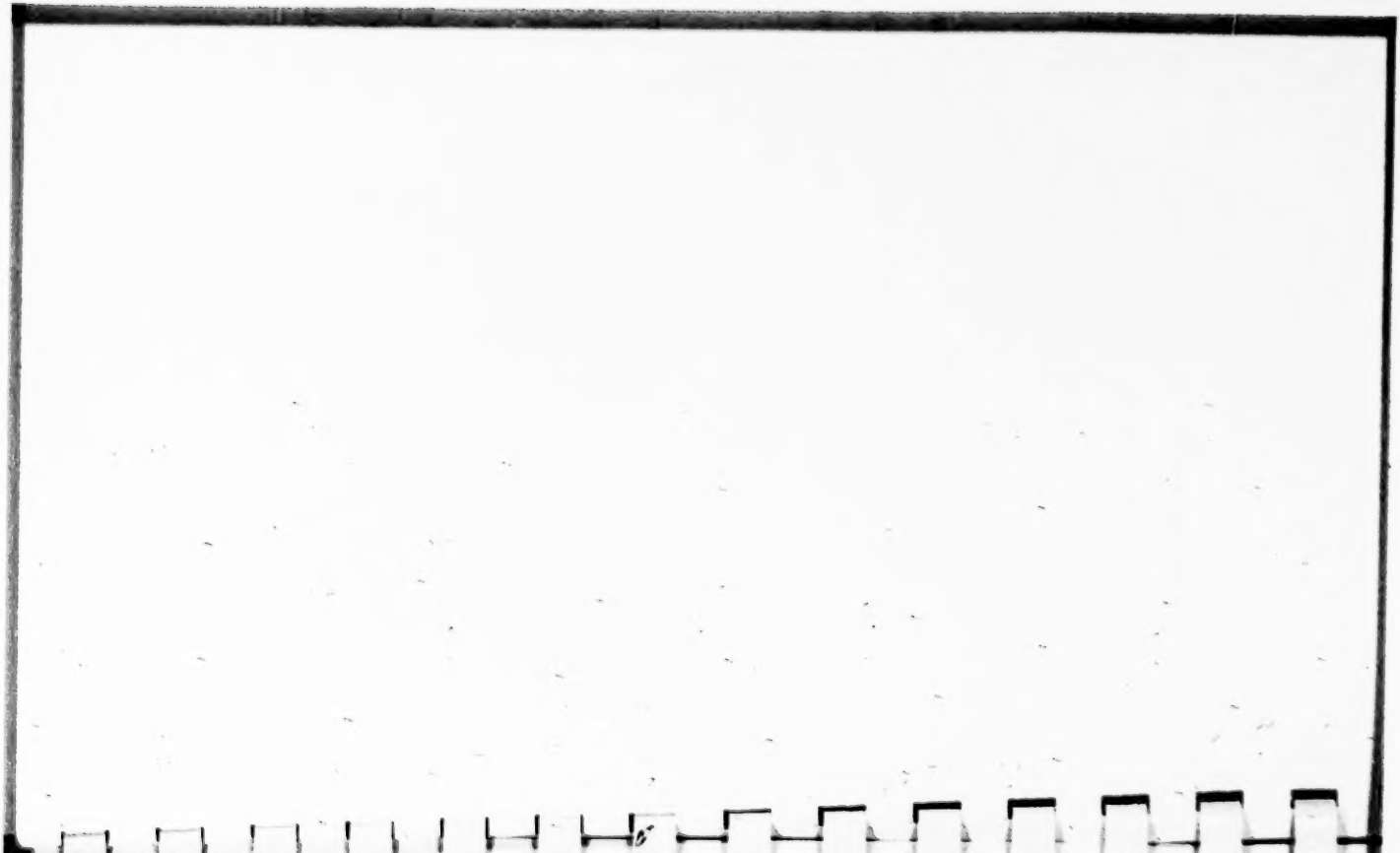
The State of Missouri provides a public service, transportation to and from school, at public expense for the benefit of children if they attend a public school. Transportation at public expense aids parents and guardians of children in complying with Compulsory Attendance statutes. It also relieves parents and guardians of the cost and expense of transportation. The children who are transported are less exposed to dangers,



inclement weather conditions, etc. Bus transportation is the safest way for children to go to and from school.

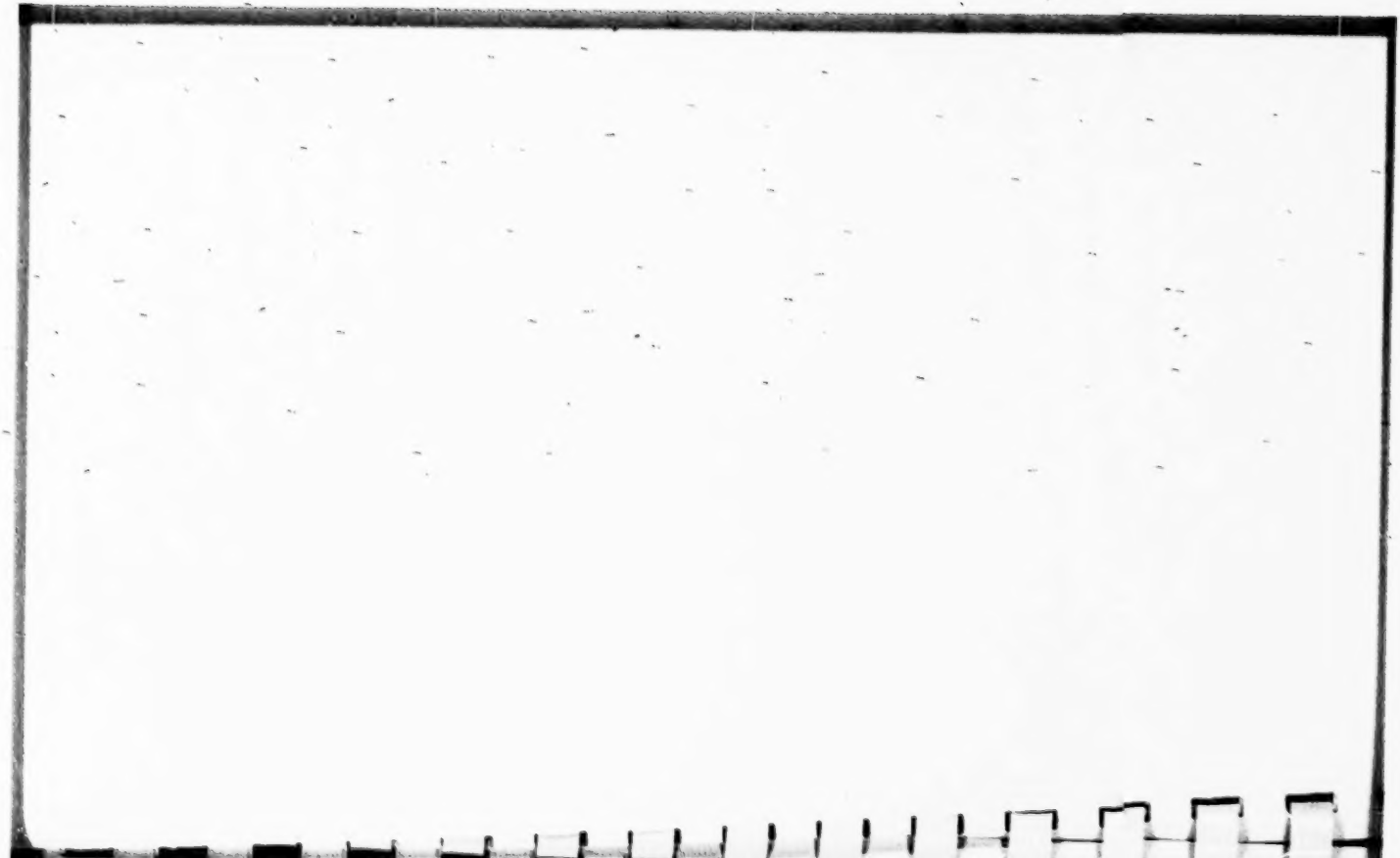
In the exercise of his parental judgment in directing the upbringing and education of his children, Appellant Urban Luetkemeyer has selected a non-public school for the education of his children. He believes it is in the best interest of his children that they attend the non-public school rather that the governmentally sponsored and controlled public school.

This Court has long recognized and declared the constitutionally protected freedom of parents to direct the upbringing and education of their children and pursuant to that right, to select schools of their choice; Pierce v. Society of Sisters, 268 U.S. 510.



The State, by means of the Compulsory Attendance Law, requires parents to see that their children, between the ages of 7 and 16, attend regularly some day school, public or nonpublic. Section 167.031, RSMo 1969. By providing the public service of the transportation of school children, the State assists some parents in meeting the requirements of the Compulsory Attendance Law and further relieves them of the economic burdens of transporting their children to school. Solely because plaintiffs' children are enrolled in a nonpublic school, they are refused the use of this public service. If they were to forego the right to select the school of their choice, then they would be allowed to receive the benefits of this service.

In Sherbert v. Verner, 374 U.S. 398,



10 L. Ed. 2d 965, 83 S. Ct. 1790, this court laid down the principle that the state cannot condition the receipt of public benefits or privileges upon the foregoing of fundamental rights. This court said, l.c. 404:

> " * * * It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

The argument that in order to receive this public service all appellants have to do is enroll in the public schools has already been rejected by a lower federal court.

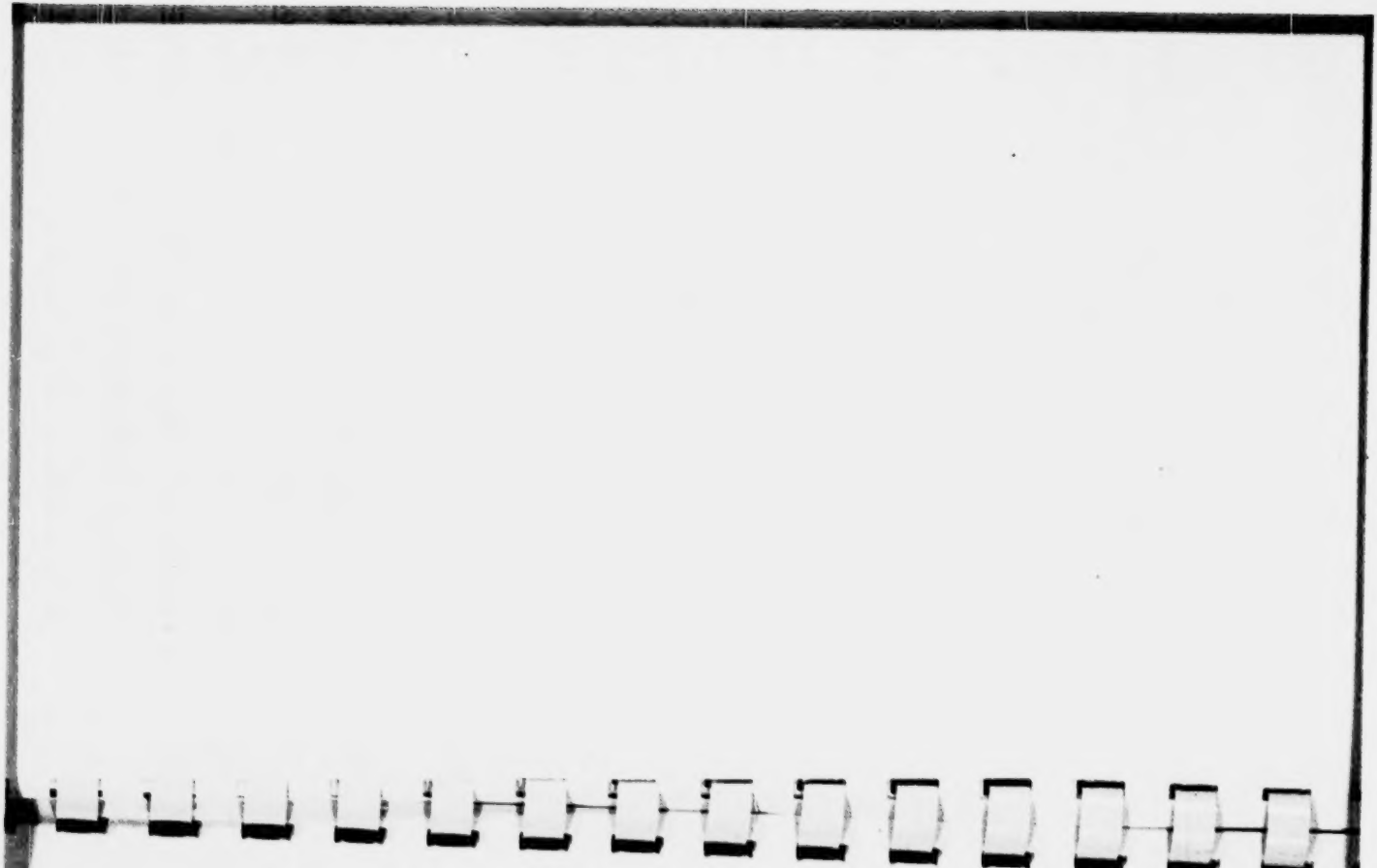
A three-judge court in St. Augustine High School v. Louisiana High School Athletic Association, E.D. La. 1967, 270 F. Supp. 757, said, l.c. 755:

"It is true that the individual Negro students may, if they desire to compete in the LHSAA transfer to a member school. But they cannot be forced to do that merely because of the prior discriminatory classification of their present school by the State. Equal justice under the law requires that the state remove its discriminatory classification so that students may freely make their choice, unhampered by the prior arbitrary action of the State."

See also: State ex rel. Hughes v. Board of Education of Kanawha Co. W. Va., 174 S.E. 2d 711, 719.

VI.

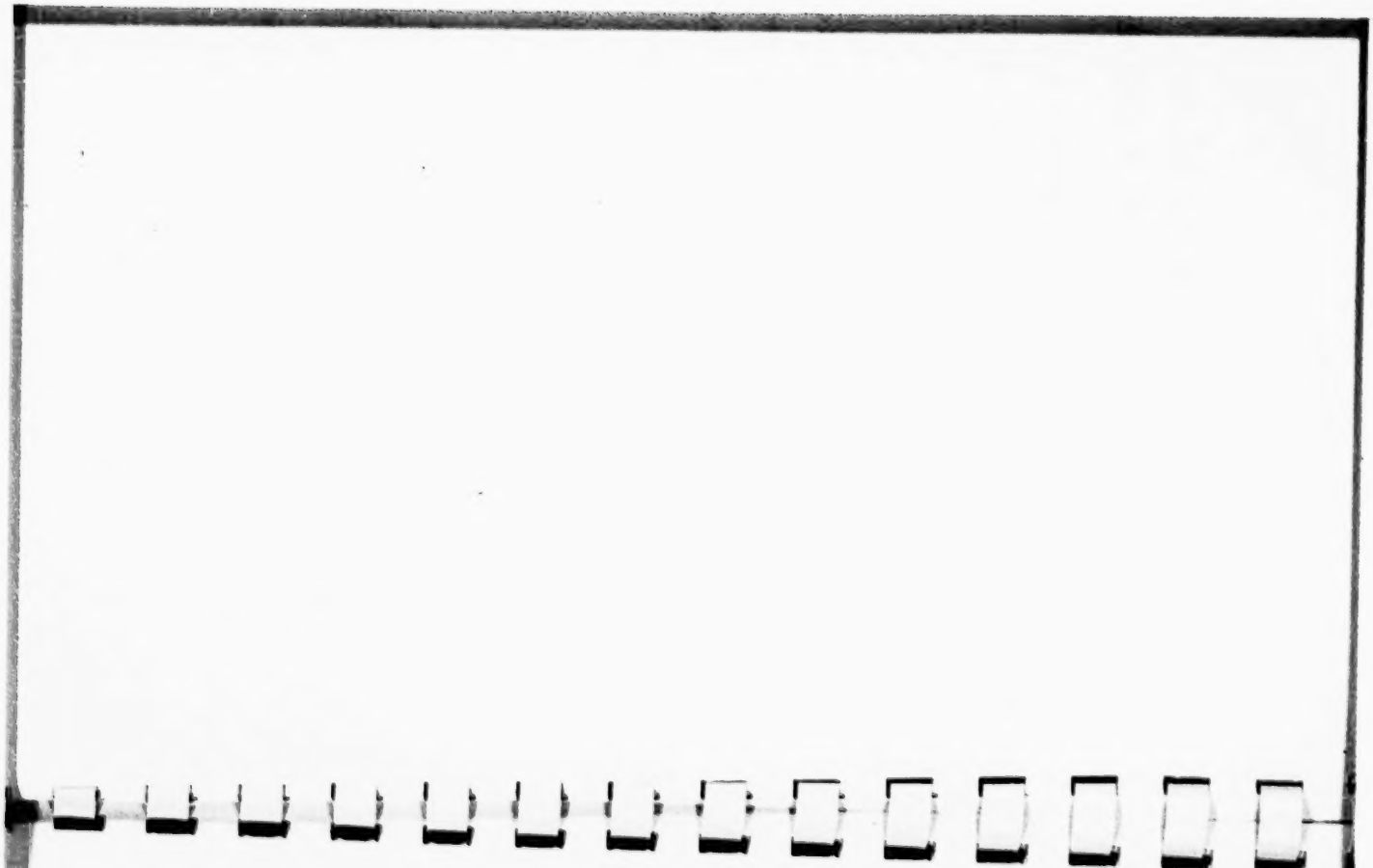
Does the denial to Appellants by Appellees of school bus transportation to and from Appellants' home and school for the reason that said school is a non-public school operated by a church impose a burden on the free exercise of plaintiffs' religion in contravention



of the 1st and 14th Amendments to the Constitution of the United States?

Appellant Urban Luetkemeyer has selected a church-related non-public school for the education of his children. It would violate his religious conscience to send his children to public schools so long as church-related schools are available on a day school basis. Many other parents in the state of Missouri select church-related non-public schools for the education of their children.

The State of Missouri provides a public service, transportation of children to and from school. However, it conditions the receipt of this service upon the requirement that the child attend a state-sponsored school.



Appellant Urban Luetkemeyer is thus forced to choose between the exercise of his religious convictions and forfeiting public paid transportation for his children or abandoning his religious convictions in order to accept the benefits of the public service. Placing such conditions upon public benefits infringes upon the free exercise of religion and violates appellants' constitutional rights. Sherbert v. Verner, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. Rep. 1790.

In State ex rel. Hughes v. Board of Education of Kanawha Co. W. Va., supra, 174 S.E. 2d 711, the Court stated l.c. 719:

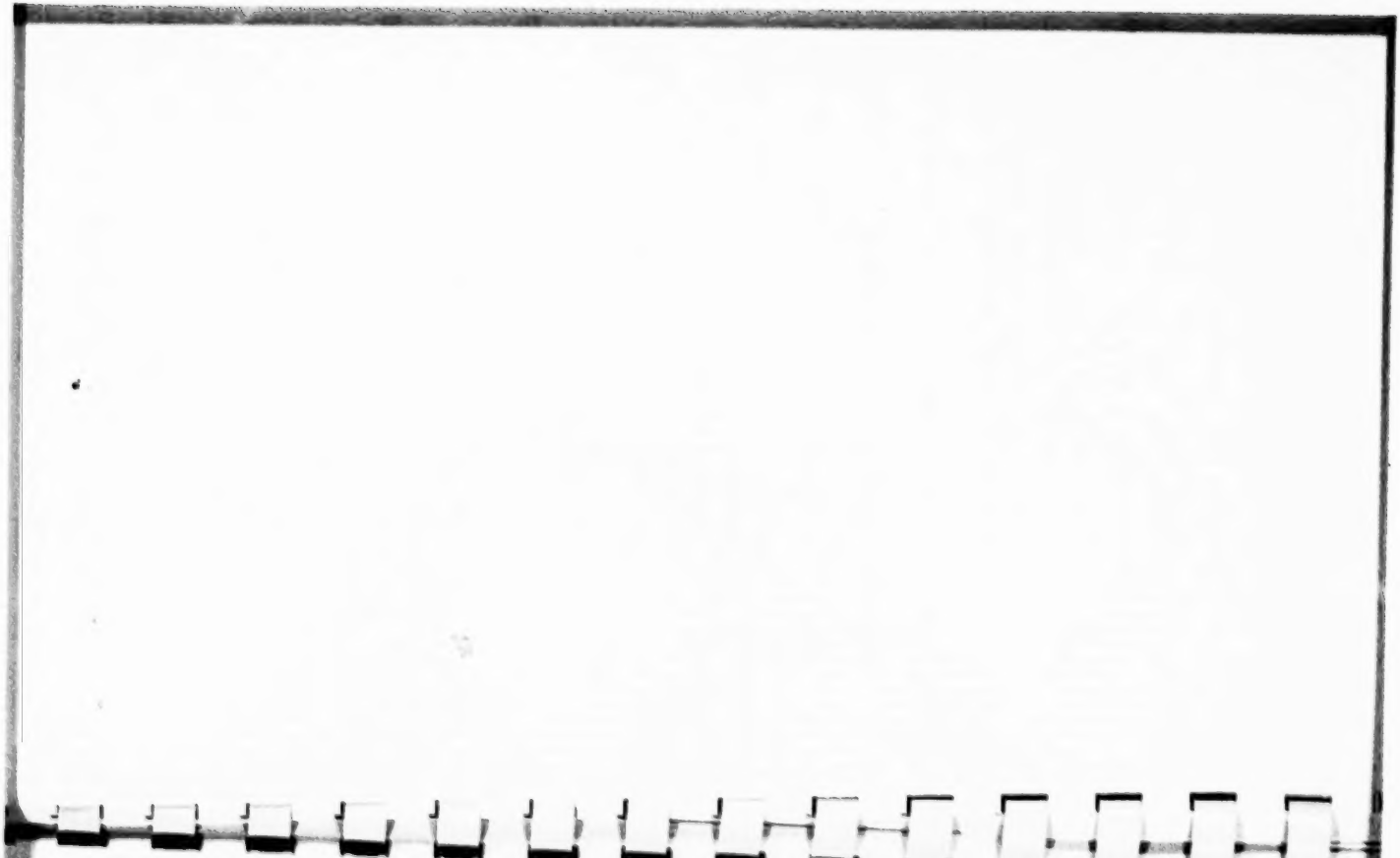
> "It is quite true that a Catholic child clearly would be afforded school bus transportation by the mere expedient of electing to attend a public school. We are of the opinion, however, that the denial to children attending

> Catholic parochial schools of equal rights of bus transportation accorded to children attending public schools deprives Catholic children and their parents of the right of religious freedom in violation of the provision of the First Amendment of the United States * * *"

The Supreme Court of Michigan in the case of In re Proposal C, Mich., supra, 185 N.W. 2d 9, stated l.c. 28:

> "When a private school student is denied participation in publicly funded shared-time courses or auxiliary services offered at the public school because of his status as a nonpublic school student and he attends a private school out of religious conviction, he also has a burden imposed upon his right to freely exercise his religion. The constitutionally protected right of the free exercise of religion is violated when a legal classification has a coercive effect upon the practice of religion without being justified by a compelling state interest. (Citing Sherbert v. Verner)".

Also see: State ex rel. Sch. Dist. v. Nebraska State Bd. of Ed. Nebr., supra,



195 N.W. 2d 161. The court stated in affirming the right of non-public school children to participate in federal remedial programs, l.c. 164:

> "It would seem that to deny a student the right to participate in a program offered by a public school district solely because that student is enrolled in a parochial school would violate that student's right to a free exercise of religion and to equal protection of the law."

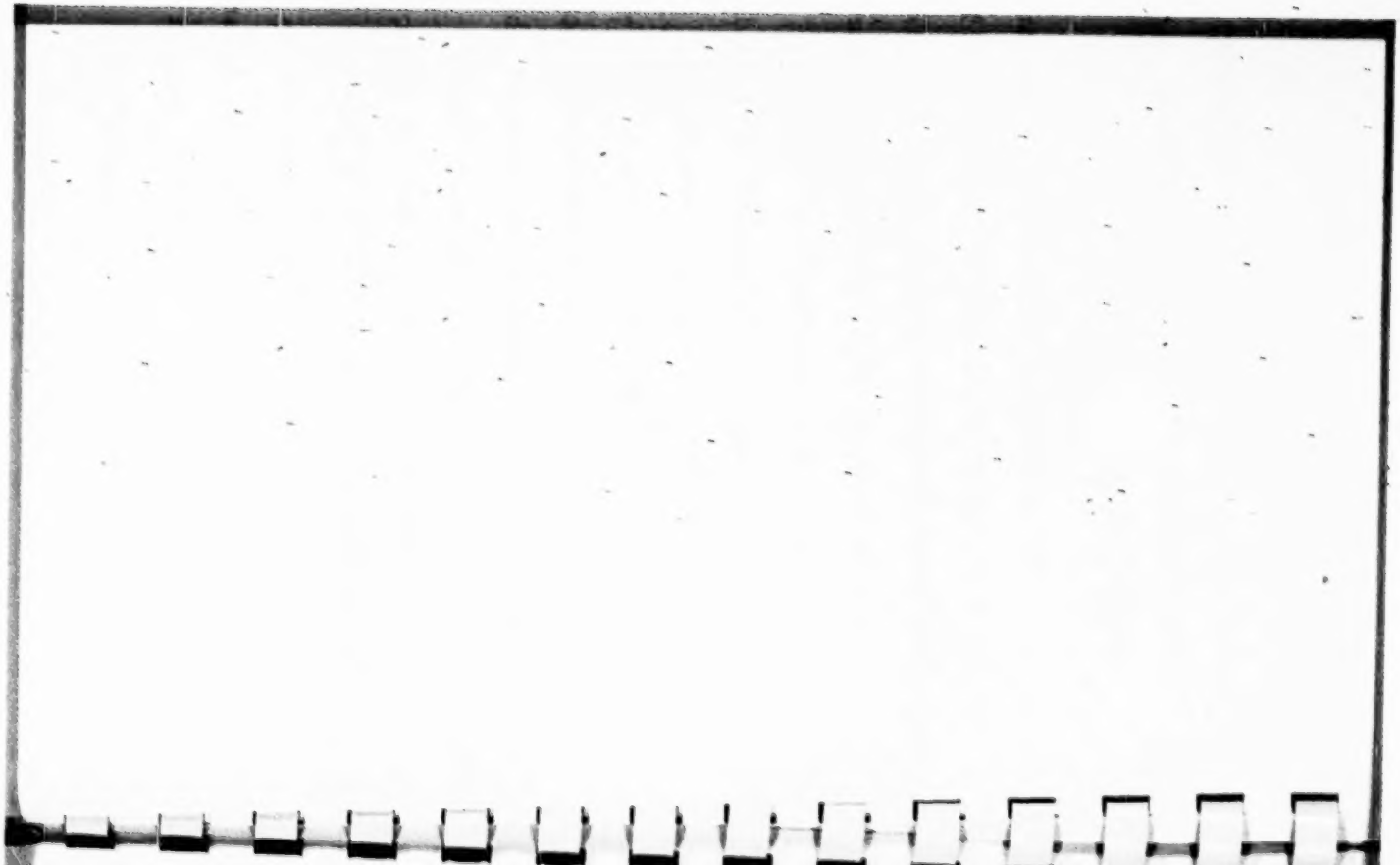
Therefore, appellants submit that defendants denial of public transportation except upon appellants foregoing the free exercise of his religious convictions constitutes an unconstitutional infringement of their right to the free exercise of religion.

VII.

Do the infringements on appellants' constitutional rights by the State of

Missouri, which deny school bus transportation to Appellants, promote a compelling state interest?

The arguments advanced by appellants in this brief demonstrate that the following constitutional rights of appellants are infringed by the denial to appellants of school bus transportation for the reason that appellants attend non-public schools rather than public schools: The denial of general governmental services to appellants constitutes invidious discrimination against appellants of their fundamental right to receive and enjoy public services and facilities on an equal basis with other citizens; a burden is placed on the appellant parent's fundamental right to direct the upbringing and education of his children; and a burden is placed on appellants' free exercise



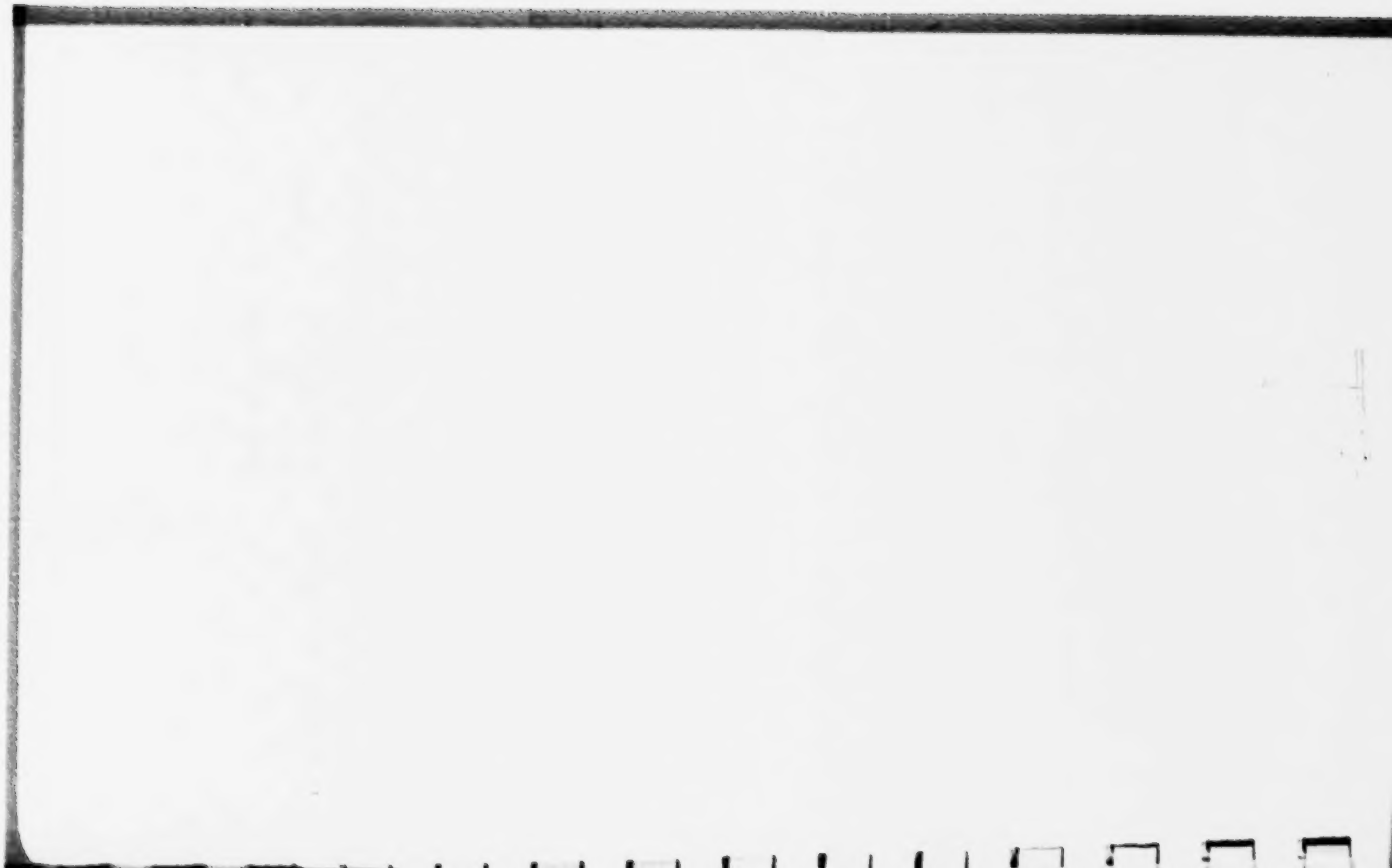
of religion. These fundamental rights may not be denied, burdened, limited, conditioned against or otherwise interferred with unless required to promote a compelling state interest.

In Oregon v. Mitchell, 400 U.S. 112, 27 L. Ed. 2d l.c. 346, Justice Brennan stated the rule as follows:

> "Of course governmental action that has the incidental effect of burdening the exercise of a constitutional right is not ipso facto unconstitutional. But in such a case, governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. (cites omitted) And once it can be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden. See Speiser v. Randall, 357 U.S. 513, 525-526, 2 L. Ed. 2d 1460, 1472, 1473, 78 S. Ct. 1332 (1958)."

Also see: Shapiro v. Thompson, 394 U.S. 618, 634, 22 L. Ed. 2d at 614; United States v. Jackson, 390 U.S. 570, 582-583, 20 L. Ed. 2d 138, 147, 148, 88 S. Ct. 1209 (1968); Sherbert v. Verner, 374 U.S. 398, 406-409, 10 L. Ed. 2d 965, 971-974, 83 S. Ct. 1790 (1963); Dunn v. Blumstein, 405 U.S. 330, (1972).

Appellants have conclusively established that their fundamental rights under the Constitution have been denied and burdened. In the absence of a clear showing by the defendants that the denial to the Luetkemeyers of transportation to and from home and St. Martins School is necessary to protect a compelling and substantial governmental interest together with a demonstration by the appellees that no less intrusive means will adequately protect compelling state



interests, the denial of such transportation is unconstitutional.

VIII.

Does the denial to Urban Luetkemeyer of health, safety, and welfare benefits to his children on an equal basis with other citizens constitute the arbitrary taking of his property without compensation and deprive him of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

Appellant Urban Luetkemeyer pays substantial sums of money in taxes to Cole County, Missouri and to the State of Missouri. In addition to the taxes actually paid by him he collects and pays over to the State of Missouri additional substantial sums of money in sales taxes

collected from his customers as a businessman. The tax moneys which he pays to Cole County and to the State of Missouri are used in part to pay for public services and facilities for the protection of the health and safety of children in going to and coming from public schools and to aid the parents of the children in complying with the Compulsory Attendance Law. The use of these public services and facilities is denied to his children in going to and coming from a non-public school.

State tax laws are in conflict with the Fourteenth Amendment of the United States Constitution where such laws propose or clearly result in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of

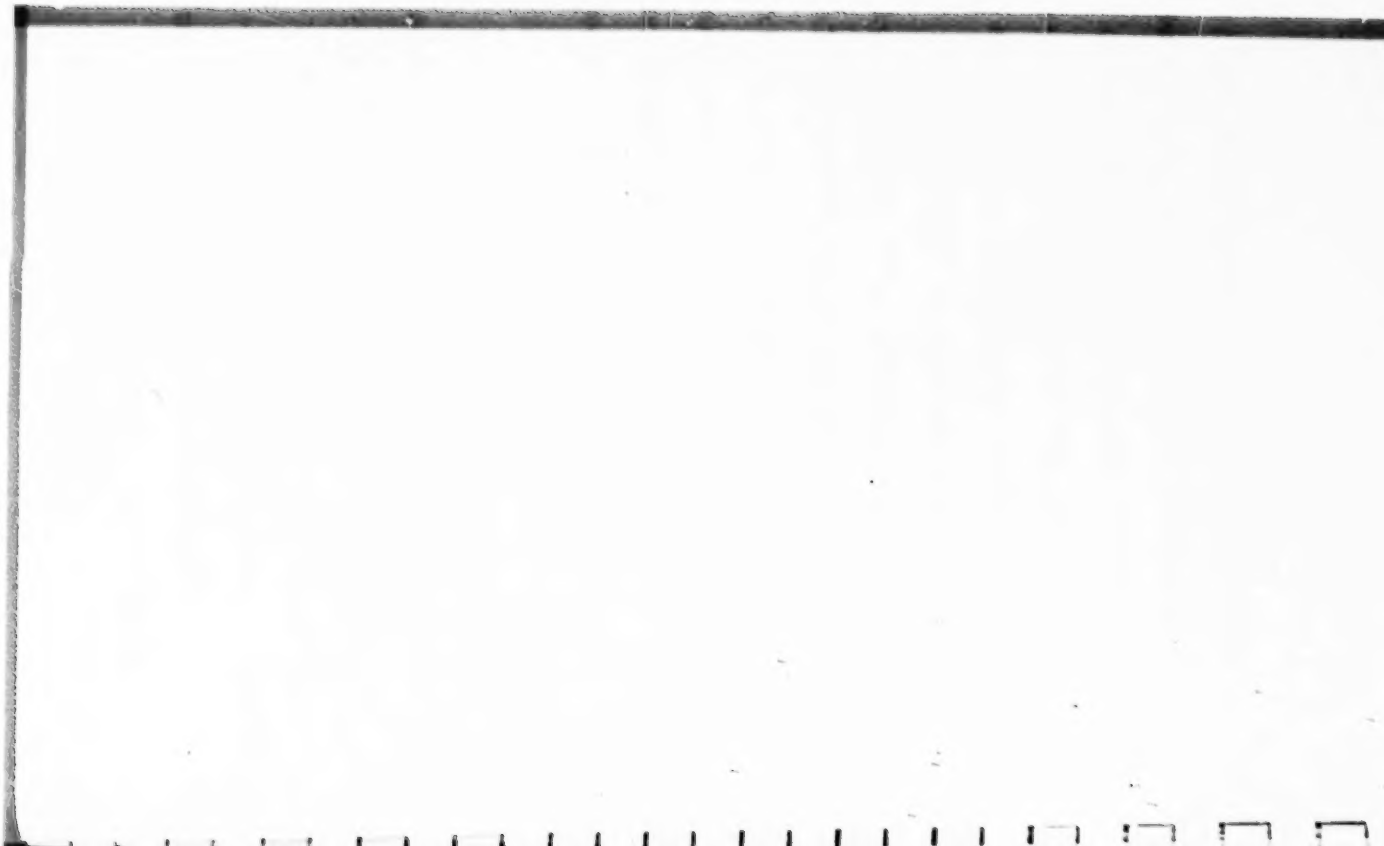
property without compensation. See: Detroit Edison Co. v. East China TP, School District No. 3, D.C. Mich. 1965, 247 F. Supp. 296, Affd. 378 F. 2d 225, cert. denied, 389 U.S. 932.

In the case before the court appellant was taxed to provide general governmental services which are intended to promote the well being of all the people. These services contribute specifically to the health and safety of children. Thus the tax burden is imposed and the benefits created by the burden are denied to the taxpayer. The effect is to take appellants' property arbitrarily without compensation.

Urban Luetkemeyer cannot use the benefits established by the state which he supports by paying taxes because the state has set up a legal barrier to his

use of the benefits. Thus he is not in a similar situation with the citizen who pays school taxes but has no children; the citizen who pays a road tax but never uses the road; or the citizen who pays a police tax but has no buildings or property to be protected. The tax-paying citizen who does not receive the benefits funded by taxes because the factual circumstances of the taxpayer are such that he has no personal need of the benefits is not constitutionally offended. Urban Luetkemeyer has not failed to receive the benefits of his taxes by reason of his factual circumstances. He has been denied the benefits by a legal barrier.

Therefore, the benefit supported by his taxes is denied to Urban Luetkemeyer constituting the arbitrary taking of his property without compensation contrary to due process of law.



IX.

The refusal of the State of Missouri to protect the health, safety, and welfare of appellants through public services and facilities which are equated with basic police protection raises questions so substantial as to require plenary consideration, by this court, with briefs on the merits and oral argument, and their resolution.

Appellants seek the protection of the state for their health, safety, and welfare on an equal basis with their follow citizens. The refusal of the state to extend these protections to appellants for the reason that they attend a non-public school is bereft of reason and a gross injustice to appellants and to others similarly situated.

There is a direct precedent in State ex rel. Hughes v. Board of Education of W. Va., supra, in which certiorari was denied and the appeal dismissed by this court. In recent years other state courts have recognized that certain state services and facilities cannot be denied to children by reason of their attendance at non-public schools. In re Proposal C, supra, and State ex rel. School Dist. of Neb. State Bd. of Ed., supra. This court denied certiorari in the latter case.

The law is living, dynamic, and growing. The development of the law in regard to the transportation of school children since Everson has overwhelmingly followed the established fact that such transportation is for the health, safety, and welfare of children. As a result

transportation is now available on a nondiscriminatory basis to almost 99% of all the school children in the country. Constitutional concepts of equal protection of the laws are not static and progress and refine as our knowledge developes; Harper v. Virginia Board of Elections, 383 U.S. 663, 669. In Nichols v. Henry, 301 Ky. 434, 191 S.W. 2d 930 the court noted this progress as follows, l.c. 933:

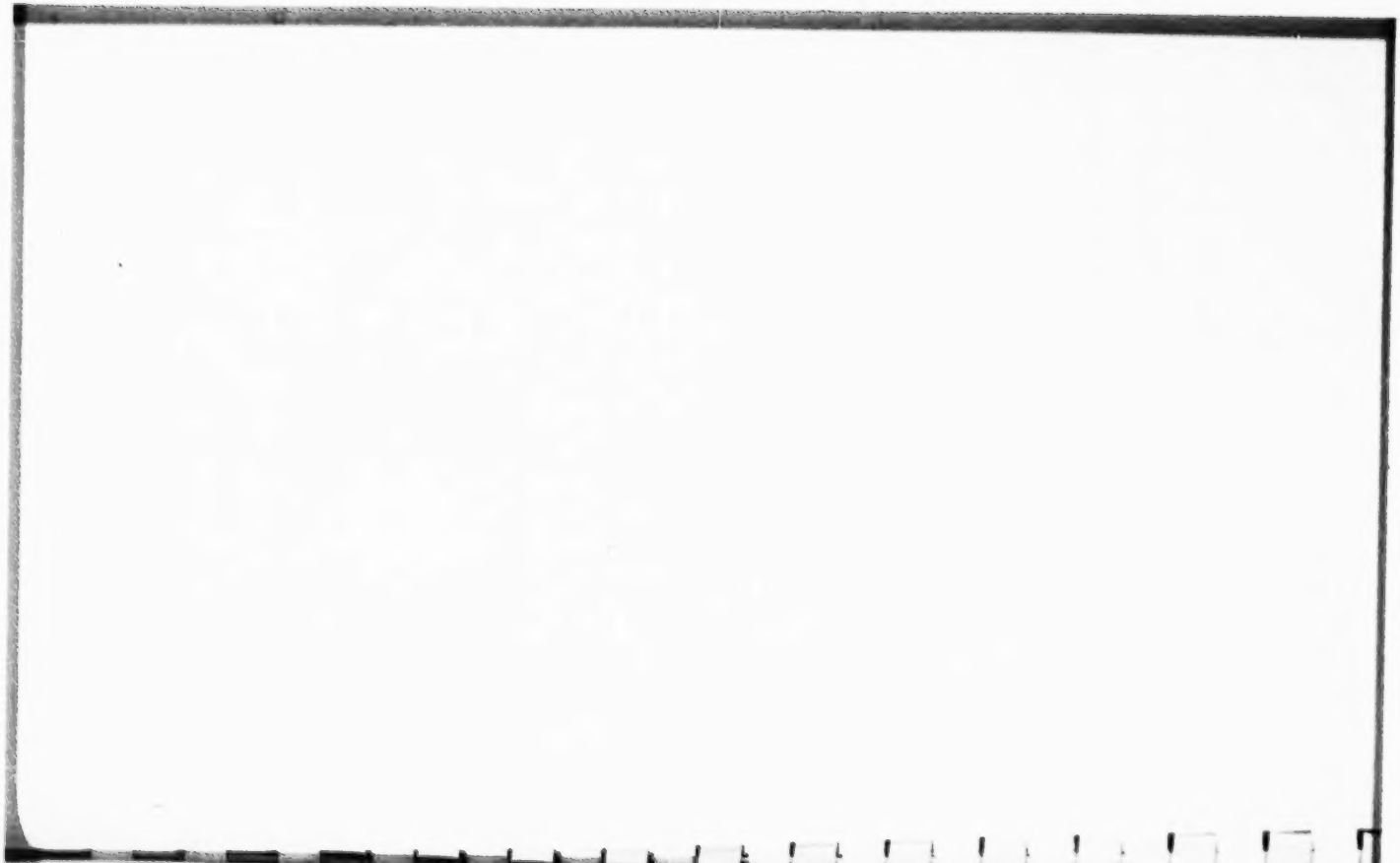
> " * * * As civilization and enlightenment have advanced, the conceptions of the lawmakers, of the courts, and of the whole body of the public with respect to what constitutes a public obligation, or a public purpose, have greatly changed * * * ."

The Kentucky court was commenting upon the transportation of children to both public and non-public schools.

Additional reasons for plenary consideration of these issues by the court appear in Chief Justice Burger's opinion in Lemon v. Kurtzman, 403 U.S. 602 as follows:

> "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment: Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969). The potential divisiveness of such conflict is a threat to the normal political process. * * * "

Chief Justice Burger relies upon the scholarly comments of Professor Freund. The comments of Professor Freund leading up to his conclusions on political divisiveness recognize that Everson may require general safety measures such as transportation of children attending non-



public schools if such protections are offered to children attending public schools; 82 Harv. L. Rev. 1680, 1682. In Professor Freund's comments relating to political divisiveness in regard to state services being rendered to children attending non-public schools he stated, page 1691:

> " * * * A choice between the permissible and the forbidden is in essence a choice whether to leave the issue to the political process in each state or locality, or to defuse the political issue. * * * "

He concluded, page 1692:

> " * * * Although great issues of constitutional law are never settled until they are settled right, still as between open-ended, ongoing political warfare and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury. * * * "

It appears stark clear to appellants that they are not seeking aid to education. The health, safety, and welfare measures in issue are more closely related to policemen than to preachers. The service and facility is a bus, not a bible. The state is forbidden to furnish preachers and bibles to anyone. Equal protection of the laws demands that the state furnish its police protection to everyone on a nondiscriminatory basis.

It is respectfully submitted that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

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MICHAEL RODAK, JR.,

NO. 73-1612

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

URBAN B. LUETKEMEYER, et al.,

Appellants,

vs.

HAROLD KAUFMANN, et al.,

Appellees.

On Appeal from the
United States District Court
for the
Western District of Missouri
Central Division

APPENDIX
TO JURISDICTIONAL STATEMENT

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INDEX

page

Appendix I - Opinion and Judgment of lower court entitled "Findings of Fact, Conclusions of Law, and Final Judgment Denying Relief Prayed for by Plaintiffs .. 1

Appendix II - Dissenting Opinion of Honorable Floyd R. Gibson 52

Appendix III - Memorandum and Order of lower court denying motion for new trial 67

Appendix IV - Notice of Appeal to the Supreme Court of the United States 69

Appendix V - Text of Statutes Involved .....
§.167.231 RSMo.....79
§.167.251 RSMo.....79
§.163.161 RSMo.....81
§.163.061 RSMo.....82
§.165.011 RSMo.....84
.....85

Appendix I

IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

URBAN B. LUETKEMEYER, et al.,

Plaintiffs,

vs. No. 1703

HAROLD KAUFMANN, et al.,

Defendants.

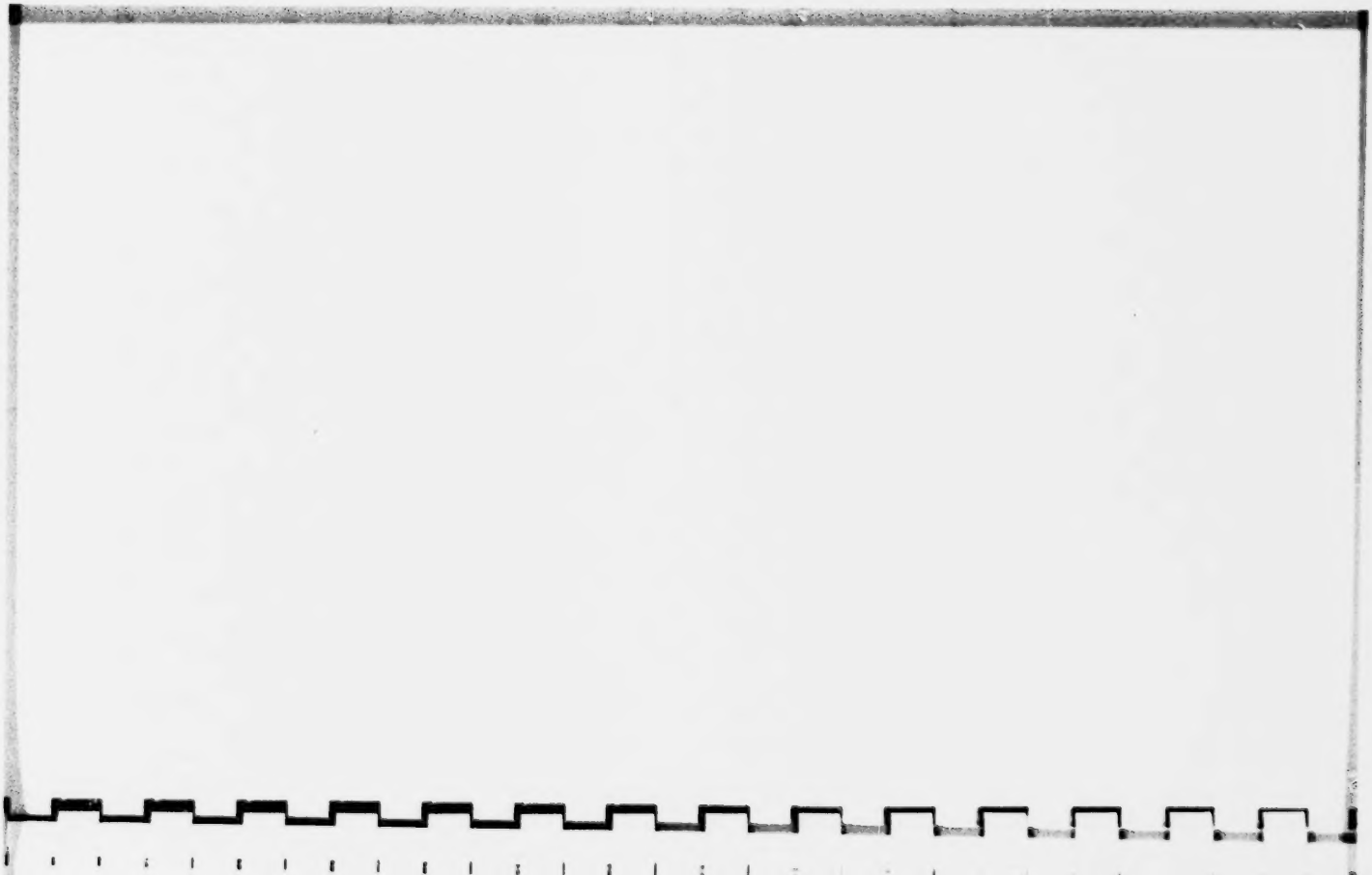
Before Honorable Floyd R. Gibson, Circuit Judge;
Honorable William R. Collinson, District Judge; and
Honorable John W. Oliver, District Judge.

John W. Oliver, District Judge (William R. Collinson, District Judge, Concurring):

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT DENYING RELIEF PRAYED FOR BY PLAINTIFFS

I.

Plaintiffs challenge those statutes of the State of Missouri which provide for transportation of public school pupils to and from school but which do not provide

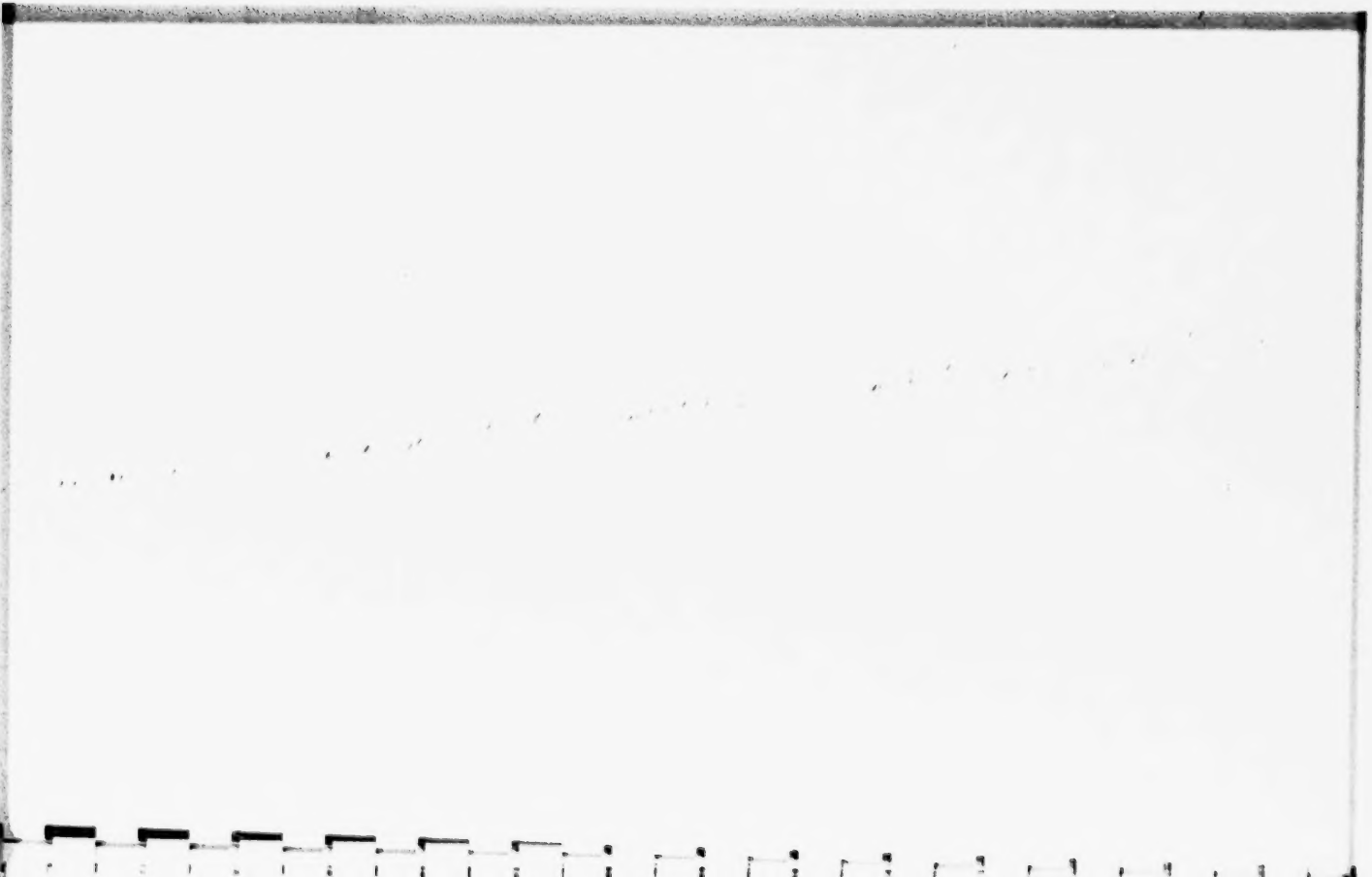


like transportation for the pupils of church-related schools. Plaintiffs contend that this denial of transportation violates particular provisions of the United States Constitution. We disagree.

Plaintiffs Urban Luetkemeyer and his children reside in the Cole County, Missouri, R-III School District. That school district transports to and from school at public expense children attending the public school. It refused, however, to transport plaintiffs' children to and from St. Martin's School, which is operated by the local parish of the Catholic Church and which they attend. That refusal was based upon the absence of any specific statutory authority to expend public funds for such transportation; upon provisions of the Missouri Constitution prohibiting the use of state funds, directly or in-

directly, in aid of religion or religious institutions; and upon the decision of McVey v. Hawkins, 258 S.W. 2d 927 (Mo. 1953), which declared that the expenditure of public funds for the transportation of school children was not lawful under the Constitution and laws of the State of Missouri.

The plaintiffs contend that the transportation of school children is a public service primarily benefiting children and their parents and not parochial schools. The denial of that benefit, plaintiffs contend, results in an arbitrary and capricious classification which unconstitutionally denies plaintiffs equal protection of the laws, denies plaintiffs of liberty without due process of law, in that it forces them to forego the exercise of their right to freely



exercise their religion in order to secure a public benefit, and penalizes the free exercise of religion in violation of the First Amendment to the Constitution.

The basic questions presented are whether the State of Missouri, once it determines to provide bus transportation only to public school students, is compelled by the Constitution of the United States to also provide like transportation to students who attend a parochial school; and whether the Missouri law which does not so provide must be declared to be repugnant to the Federal Constitution.

The relevant facts were wholly stipulated. Our findings of fact therefore quote or paraphrase the stipulation of the parties.

II. FINDINGS OF FACT

1. The plaintiffs are Urban Luetke-

meyer and his children, Kennan and Jacqueline, ages 14 and 10, respectively. The Luetkemeyers live in a rural area of Cole County, Missouri, adjacent to U. S. Highway 50. Their home is approximately 200 yards from the highway.

2. The Luetkemeyers are members of the Catholic Church and the Luetkemeyer children attend St. Martins School which is operated by St. Martins Parish of the Catholic Church. The school is located in the unincorporated village of St. Martins on U. S. Highway 50, approximately 2 miles west of the Luetkemeyer home. St. Martins School is an elementary school which offers a curriculum for grades 1 through 8. It would violate the religious conscience of Urban Luetkemeyer to send his children to public schools for their education as long as a Catholic church-

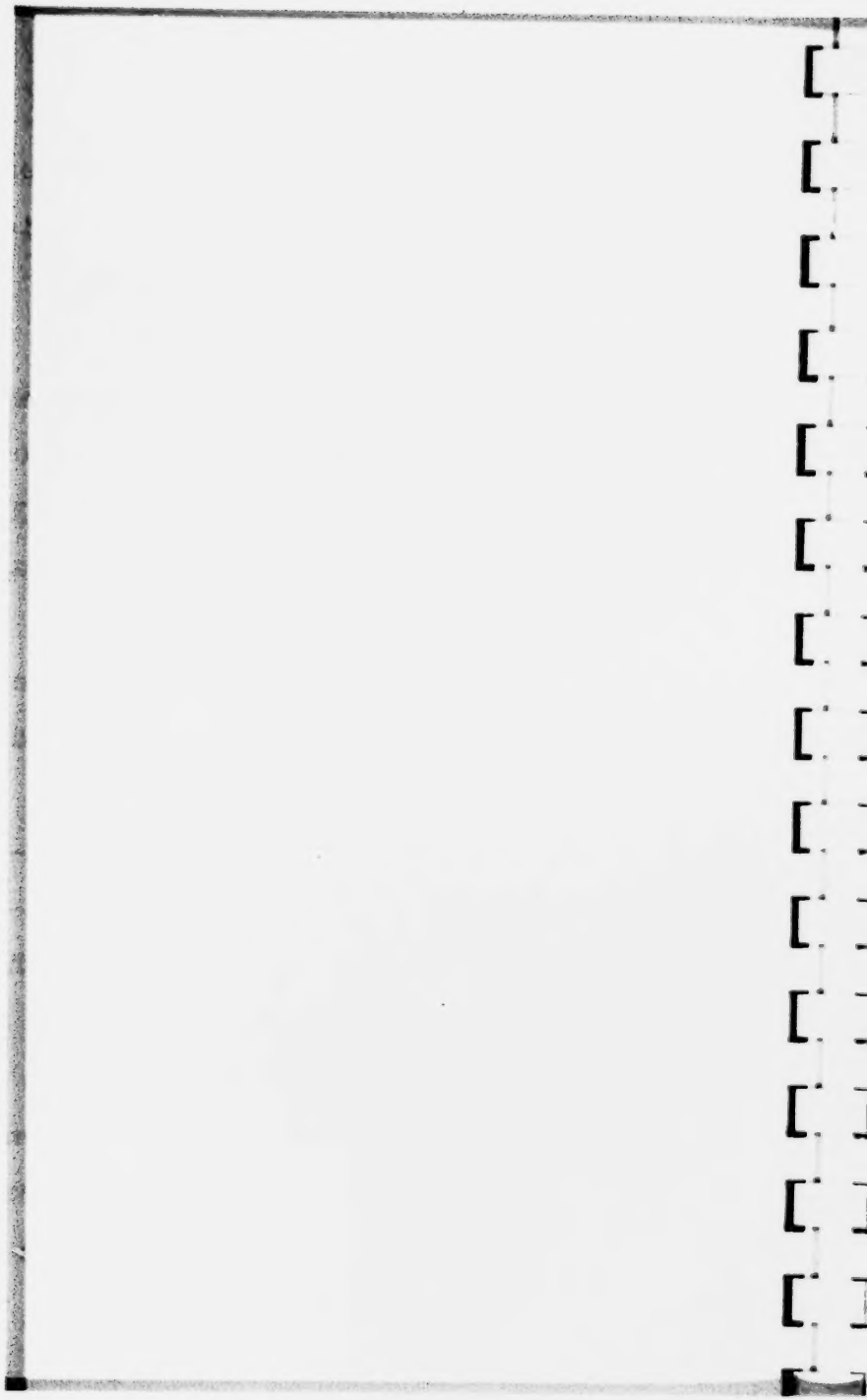
related school is available on a day school basis for the education of his children.

3. Cole County R-III School District is a public school district which operates an elementary school in Centertown, a village located on U. S. Highway 50, approximately 7 miles west of the Luetkemeyer home. Both St. Martins school and the Luetkemeyer home are within the boundaries of Cole County R-III School District. During the 1970-1971 school year, there were 207 children enrolled in grades 1 through 8 in attendance at Cole County R-III School. During the 1970-1971 school year there were 205 children enrolled in grades 1 through 8 in St. Martins School.

4. Local public school districts with the assistance and cooperation of the

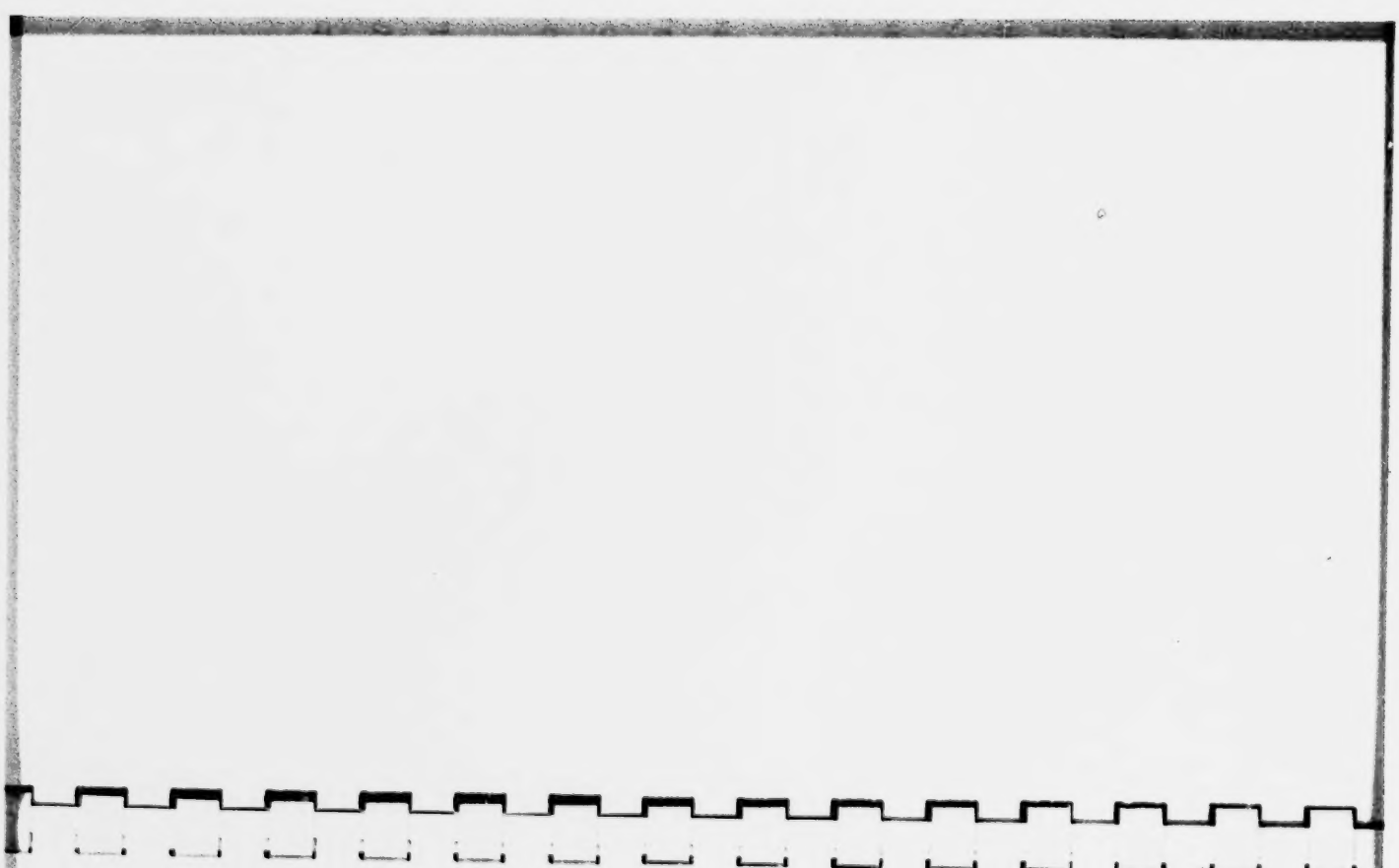
State of Missouri through the State Board of Education must provide transportation to and from home and school for all children living more than 3 1/2 miles from school and may provide transportation for all children living one mile or more from school pursuant to Section 167.231, R.S.Mo., 1969. The expense of the transportation is paid by state funds and local funds derived from state and local taxes pursuant to Sections 162.161 and 167.251, R.S.Mo., 1969.

5. Cole County R-III School District with the assistance and cooperation of the State Board of Education has established and operates a system of school bus transportation to and from home and school for children who attend the public school maintained and operated by the district. Free transportation is



offered to all children who live one mile or more from school. During the 1970-1971 school year, the average daily number of children enrolled in grades 1 through 8 of the Cole County R-III School District who were transported to and from home and school was 130.35. Five buses with passenger capacity ranging from 66 to 48 passengers each and four other vehicles with the capacity of 12 passengers each are operated by the district for the transportation of children to and from school. Cole County R-III School District was reimbursed by the State of Missouri for all of the total cost of providing said transportation (except for $126.96, which was the cost of transporting two pupils who were not eligible for state transportation).

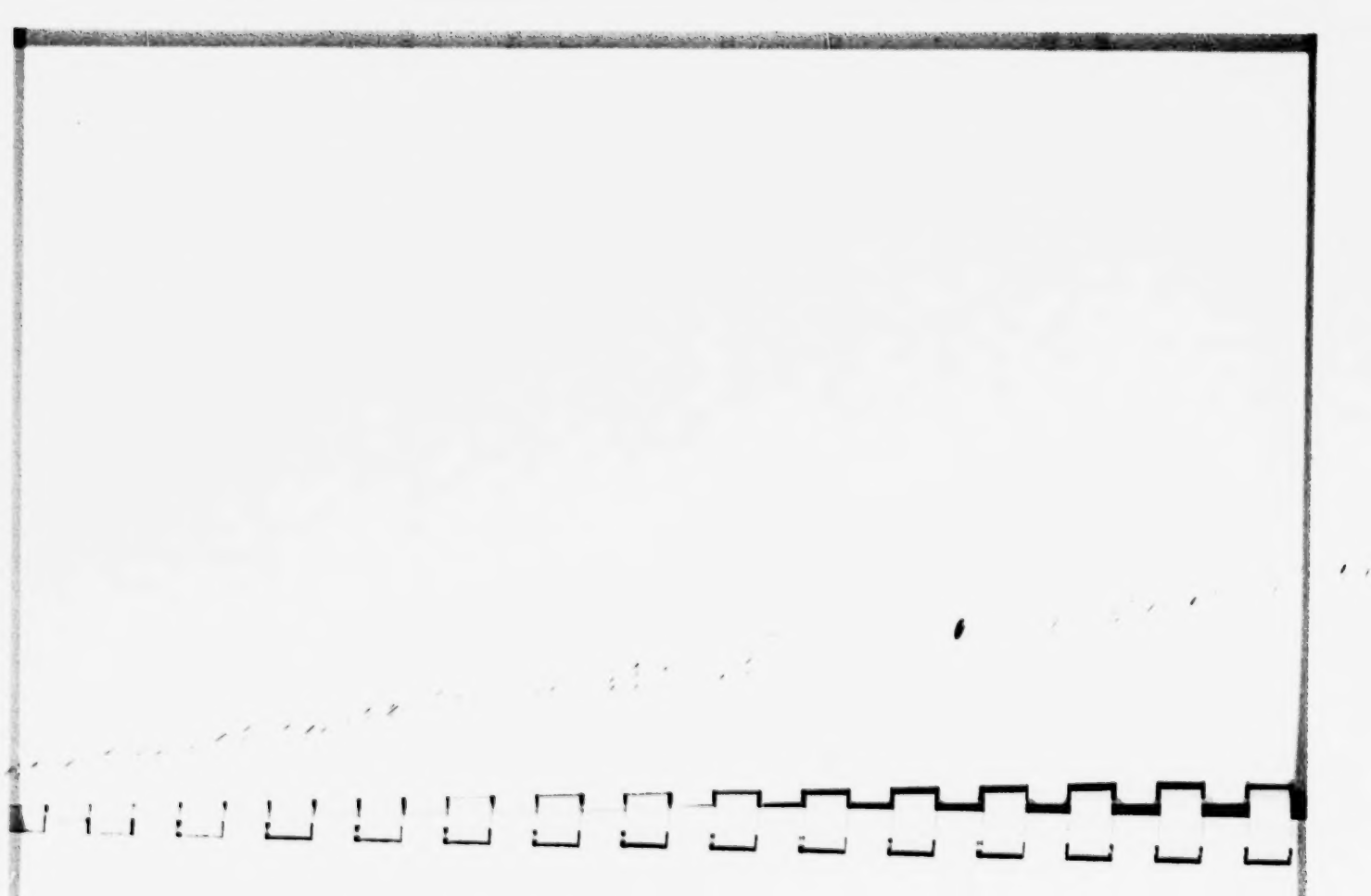
6. In 1970 Urban Luetkemeyer paid



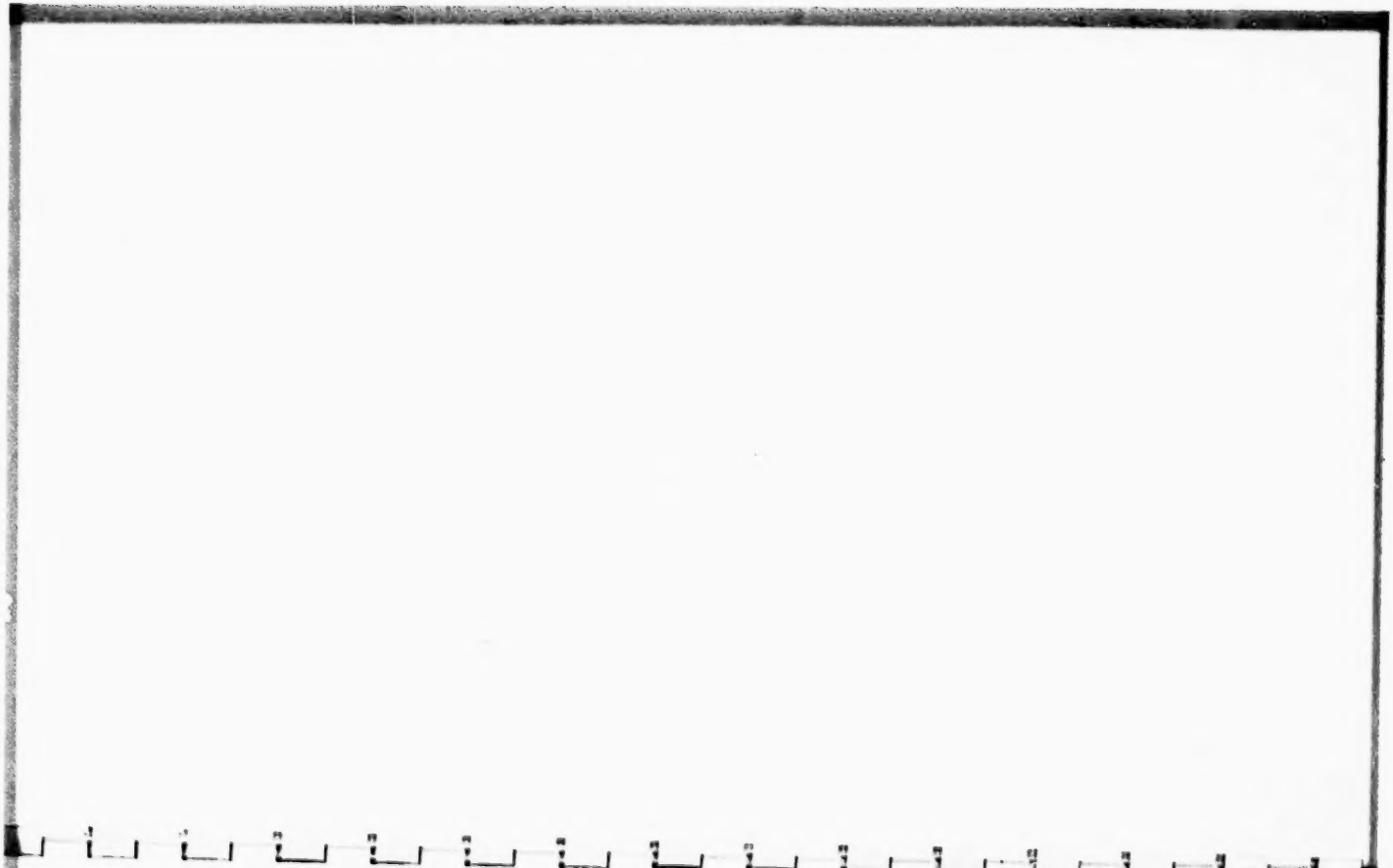
more than $985.00 in real and personal property taxes to Cole County, more than $625.00 in income taxes to the State of Missouri, and more than $250.00 in sales taxes to the State of Missouri. As the owner and operator of a retail business establishment, he collected from his customers and paid to the State of Missouri more than $4,250 in sales taxes in 1970. The income taxes and sales taxes paid by Urban Luetkemeyer and the sales taxes collected by him from his customers have been paid to the State of Missouri and deposited in the General Revenue Fund of the State of Missouri, and a portion of that fund has been appropriated to the Public School Fund of the State of Missouri. A portion of the Public School Fund has been allocated and paid to the Cole County R-III School District in re-

imbursement of the cost of providing pupil transportation as set forth above.

7. A school bus route established and operated by the Cole County R-III School District passes by a point on U. S. Highway 50 which is approximately 200 yards from the Luetkemeyer home and continues on U. S. Highway 50 and passes directly by St. Martins School which is attended by the Luetkemeyer children. The Luetkemeyers have demanded of the members of the Cole County R-III School Board that transportation be provided to the Luetkemeyer children to and from their home and St. Martins School on the existing facilities and routes operated and maintained by Cole County R-III School District. On January 12, 1971, the Luetkemeyers made an unsuccessful effort to board a Cole County R-III bus



for transportation to St. Martins School. The school district's officers and employees have refused to allow the Luetkemeyer children to use the school district bus facilities for the purpose of going to and from St. Martins School from the Luetkemeyer home. The officials of Cole County R-III School District refused to allow the Luetkemeyer children to use the bus facilities in going to and from St. Martins School for the reason that in their opinion the law of the State of Missouri prohibits the transportation at public expense of children to and from a non-public school. The school district is supported in its refusal to provide transportation of children going to and from a non-public school by the Executive Department of the State of Missouri in its administration of the statutes, by

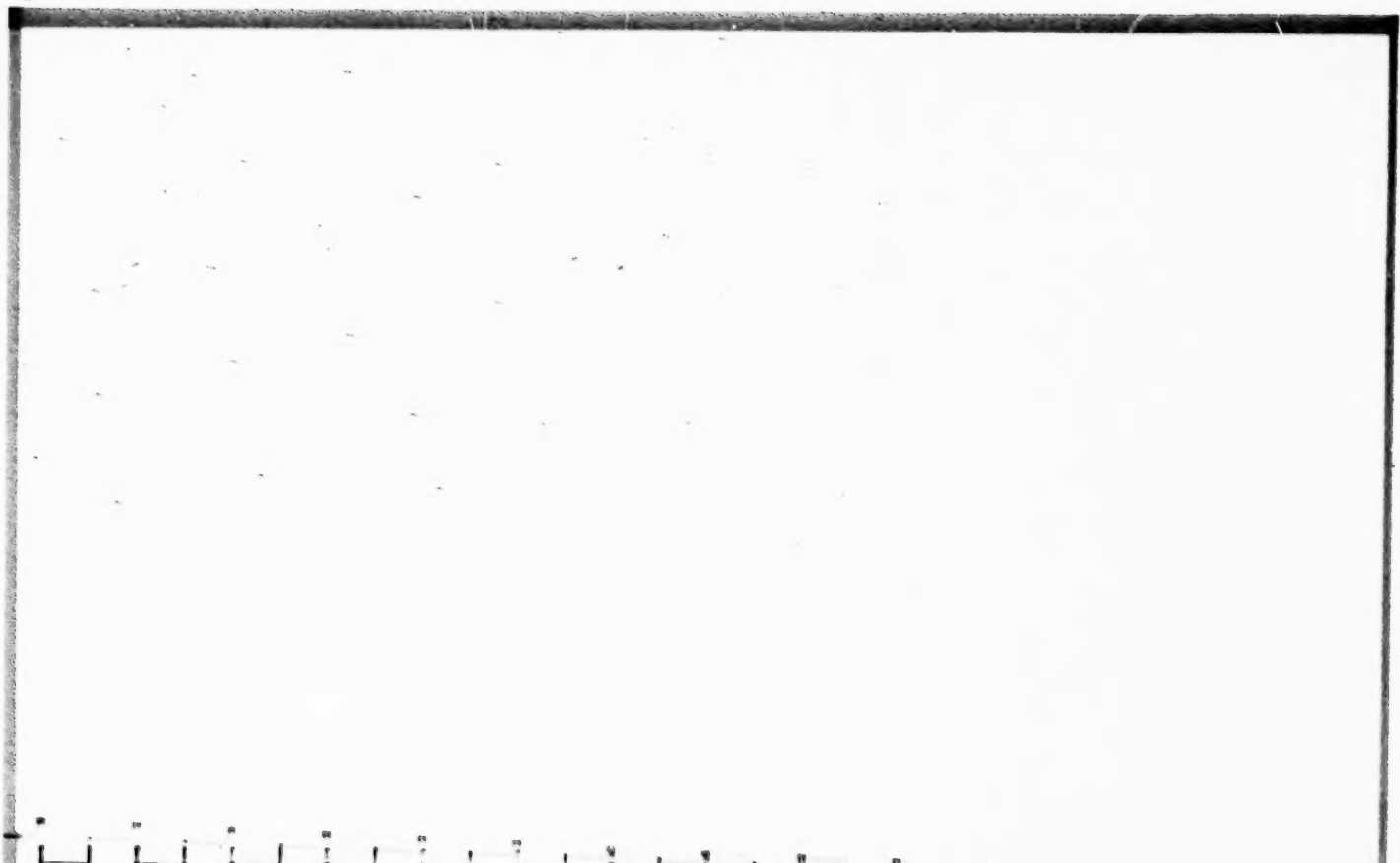


the Judicial Department of the State of Missouri in its interpretation of the statutes, and by the Legislative Department of the State of Missouri in its appropriation of tax moneys to fund the transportation of children to and from home and school.

8. The route which the Luetkemeyer children must follow in going to and from home and St. Martins School is on U. S. Highway 50 in a rural area. There are no paved sidewalks or walkways, traffic control devices, and protected pedestrian crosswalks on the route. There are generally no sidewalk or walkways, traffic control devices and protected pedestrian crosswalks on the streets, roads and highways through the Cole County R-III School District. The average daily traffic on the route is 5,650 vehicles.

9. St. Martins School is a nonprofit school operated by St. Martins Parish of the Catholic Church. The sole source of income for the school is the contributions and donations from patrons and friends and fees charged its pupils.

10. The St. Martins School does not provide transportation to and from home and school. The parents or guardians of the children have the sole responsibility of getting the children to and from school. Approximately 100 children attending St. Martins School live more than one mile from that school and if transportation were provided to children attending St. Martins on the same basis as is provided to children attending Cole County R-III School, approximately 100 children would be eligible for transportation. Most of the



children attending St. Martins School who live one mile or more from the school are located along existing school bus routes.

11. The free transportation provided to children who attend Cole County R-III Public School aids the parents and guardians of these children in complying with the requirements of the Compulsory Attendance Law. This free transportation also relieves the parents and guardians of these children of the cost and expense of transportation to and from school. The parents and guardians of children who attend St. Martins School are denied the benefit of free transportation in complying with the requirements of the Compulsory Attendance Laws and are burdened with the cost and expense of transporting their children to and from school.

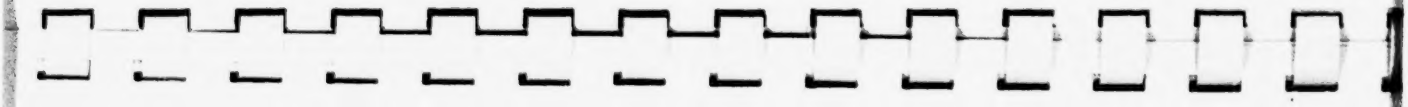
12. School bus transportation is a

safer means for pupils to travel to school than private vehicle or pedestrian travel. The evidence shows that buses are subject to statutory and regulatory safety standards to which private vehicles are not subject, school bus traffic is governed by special traffic control requirements, and school bus drivers are subject to special qualification standards. The probability of accident and injury in going to and from school for pedestrian pupils increases with the distance the pupils must travel between home and school, given a certain community with certain hazards of pedestrian travel.

13. The total estimated expenditure for public elementary and secondary education in the State of Missouri in 1970-1971 is $875,300,000. During the

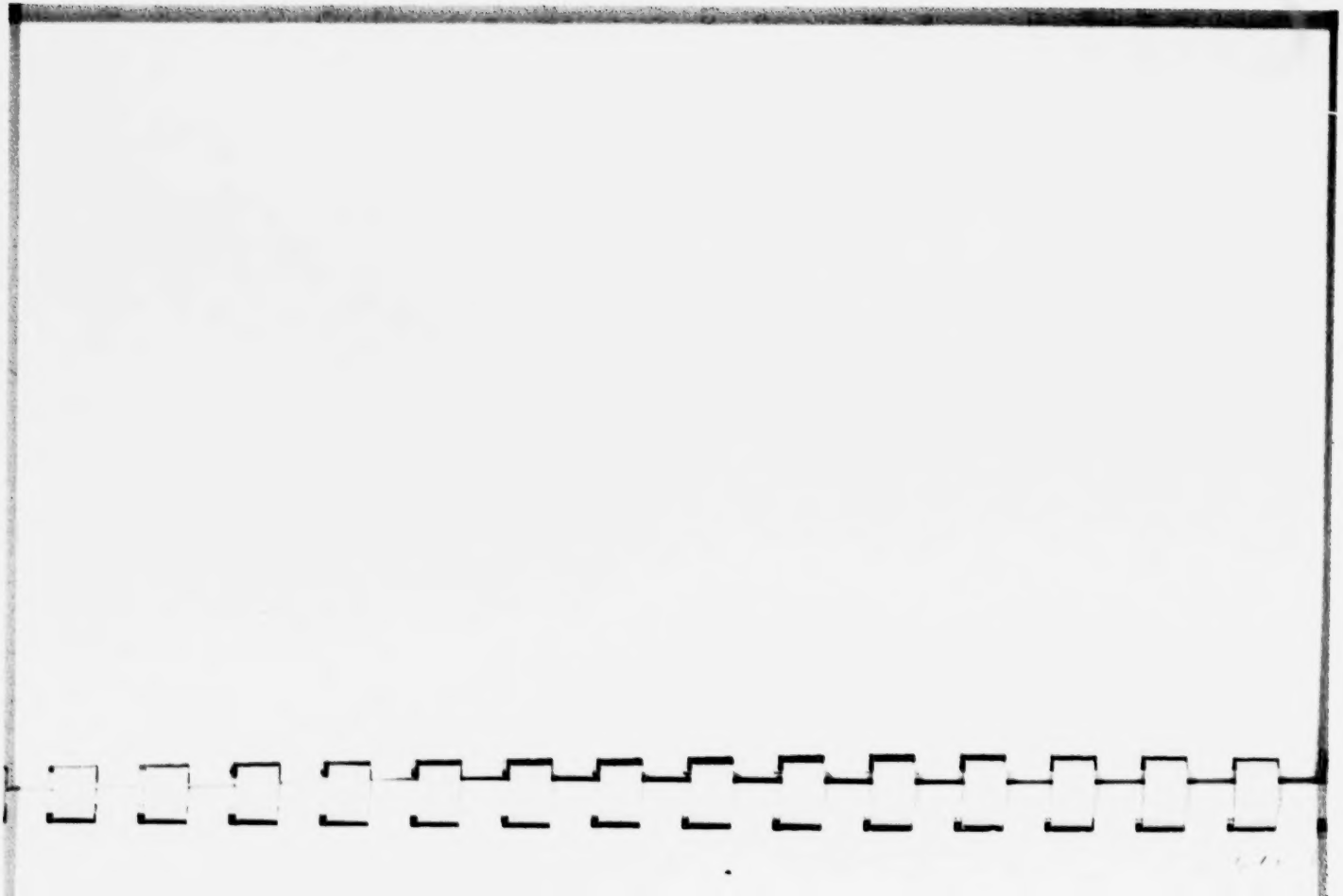
1970-1971 school year the total cost of transporting pupils enrolled in grades Kindergarten through 12, inclusive, of public schools in the State of Missouri by public school districts was $33,028,006, or 3.7% of total expenditure for public schools. The average cost per pupil for transportation was $66.72.

14. The total cumulative enrollment in public schools, grades Kindergarten through 12, inclusive in the State of Missouri for the 1970-1971 school year was 1,084,833 pupils. During the 1970-1971 school years the number of pupils enrolled in Grades Kindergarten through 12, inclusive, of public schools and transported at one time or another by public school districts in Missouri was 585,650. During the 1970-1971 school



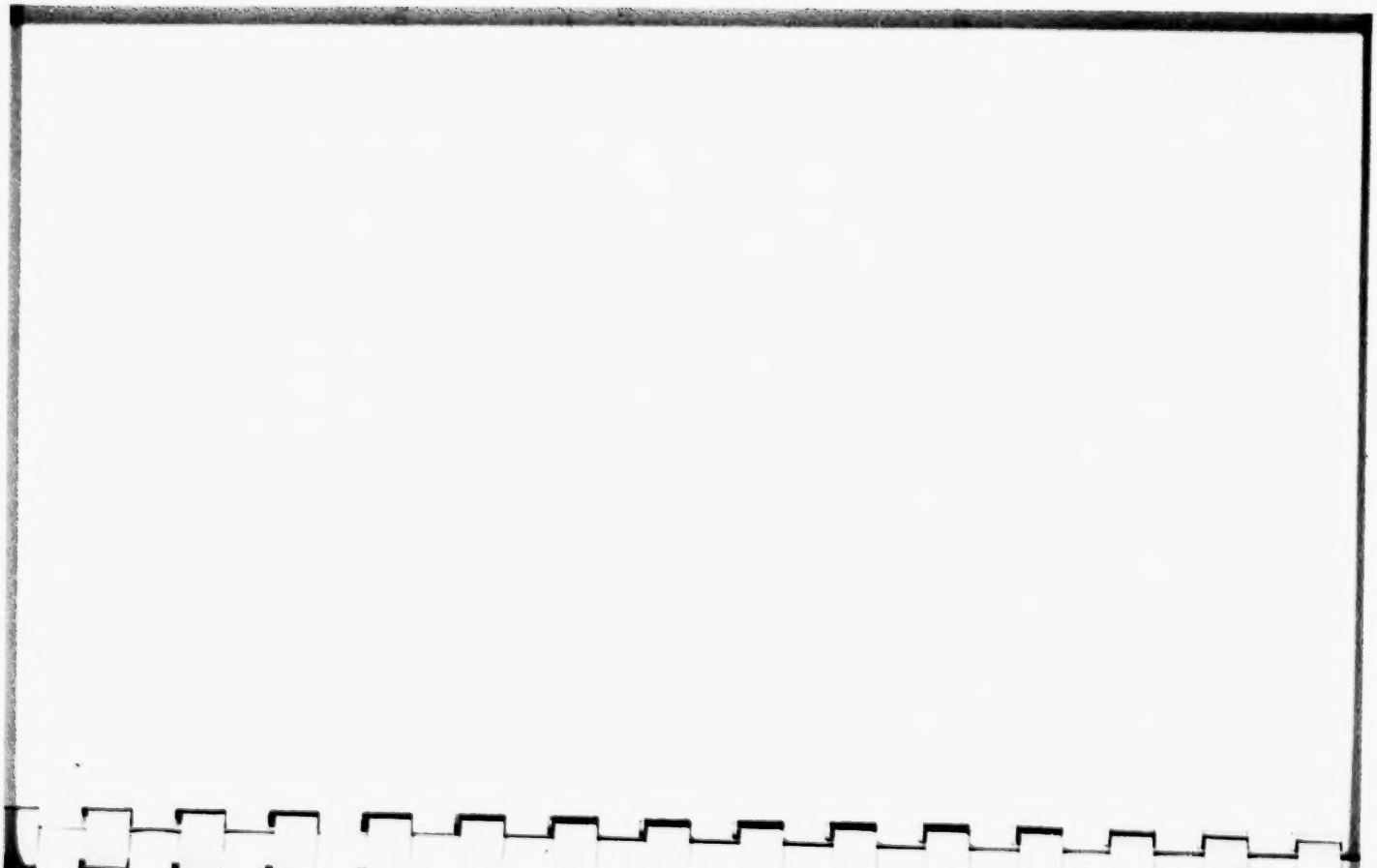
year the average daily number of pupils enrolled in Grades Kindergarten through 12, inclusive, of public schools transported by public school districts in the State of Missouri was 495,024. Therefore, 45.6% of the public school pupils were transported.

15. Based upon data reported to the State Department of Education under the Elementary and Secondary Education Act of 1965, the total number of nonpublic schools in Missouri during the 1969-1970 school year was 553, which number was composed of 385 Catholic schools, 80 Lutheran schools, 3 Jewish schools, 12 Amish schools, 10 Seventh Day Adventist schools, and 63 other nonpublic schools. Based upon data reported to the State Department of Education under the Elementary and Secondary Education act of 1965,



the total number of nonpublic school pupils during the 1969-1970 school year was 134,593, which number was composed of 116,213 pupils attending Catholic schools, 10,844 pupils attending Lutheran schools, 235 pupils attending Jewish schools, 242 pupils attending Seventh Day Adventist schools, and 7,059 pupils attending other nonpublic schools. These figures are based upon reports from 85% of the nonpublic schools. Of the schools reporting, 94.8% of students attending nonpublic schools are attending church-related schools.

16. As noted above, 45.6% of the children attending public schools in the State of Missouri during the 1970-1971 school year were transported. If the same percentage of children attending nonpublic schools in Missouri would be



eligible for transportation, the estimated average daily number of children attending nonpublic schools to be transported would be 61,374. The estimated maximum cost of transporting nonpublic school children, based upon the average cost per child of transporting public school children would be $4,094,872 per year.

The total estimated expenditures for public elementary and secondary education in the State of Missouri in 1970-1971 was $875,300,000. The estimated cost of transporting nonpublic school children to and from school would be less than 1/2 of 1% (0.46%) of the total annual expenditure for public elementary and secondary education.

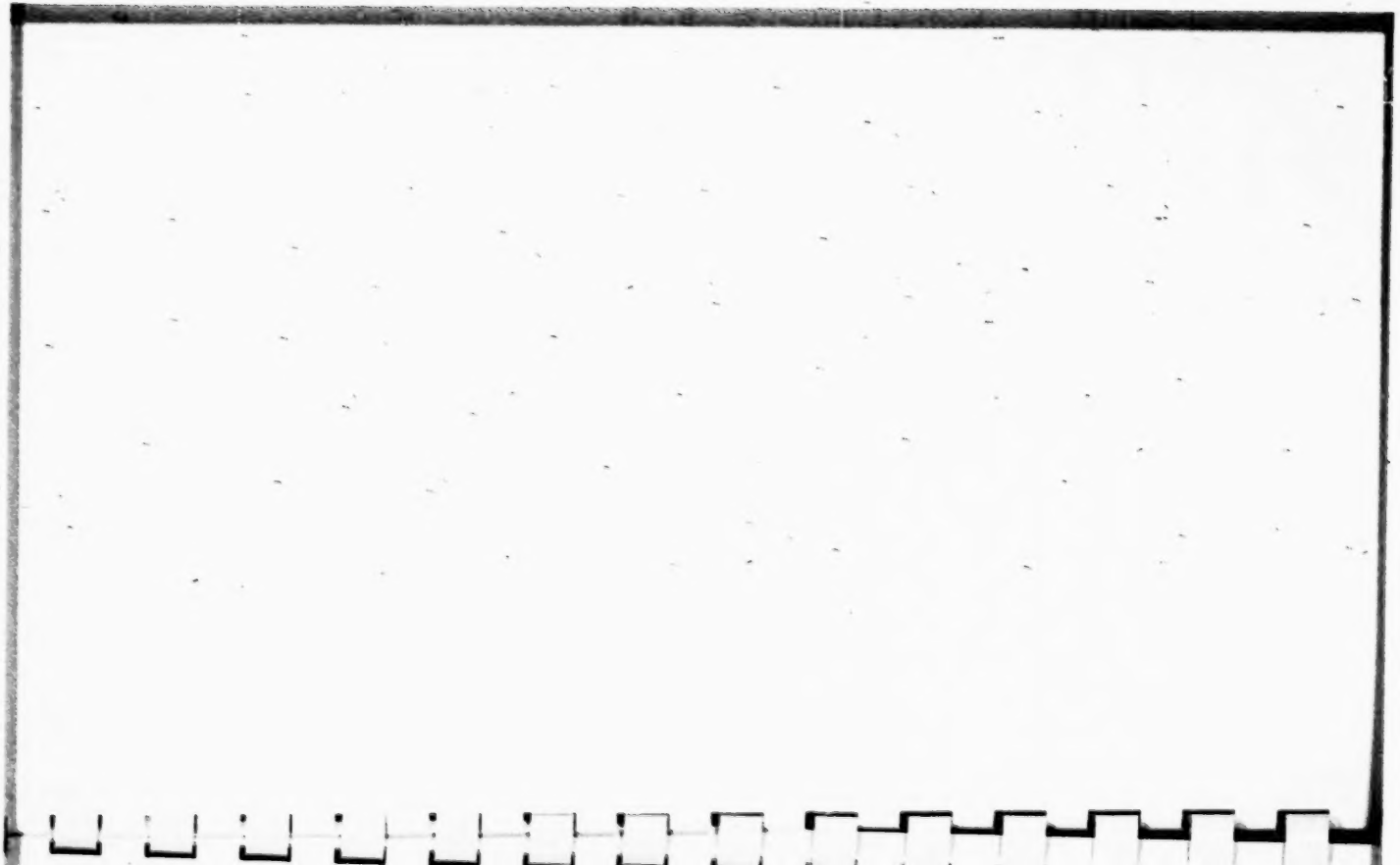
17. The transportation of children to and from both public and nonpublic

schools at public expense is provided for in 27 states. The 1970-1971 public school enrollment in these states was 30,759,554. The 1970-1971 enrollment in Catholic schools in these states was 3,693,818. Twenty-three states do not provide transportation at public expense for children going to and from nonpublic schools. The public school enrollment in these states for 1970-1971 was 16,708,281. The 1970-1971 enrollment in Catholic schools in these states was 624,978.

III. CONCLUSIONS OF LAW

A. Child Benefit Theory

Plaintiffs place great reliance on the "child benefit theory" spelled out in Everson v. Board of Education, 330 U. S. 1 (1946); Board of Education v. Allen, 392 U. S. 236 (1968), and other cases. Those cases concluded that States



may constitutionally provide particular services to pupils attending religious schools (school bus transportation and school textbooks, respectively) on the theory that such services were for the benefit of the "parents and children, not schools," Allen, supra, at 392. Those cases, however, did not relate to the question presented in this case. Principles which state what a State may do may not properly be read as a command to what a State must do.

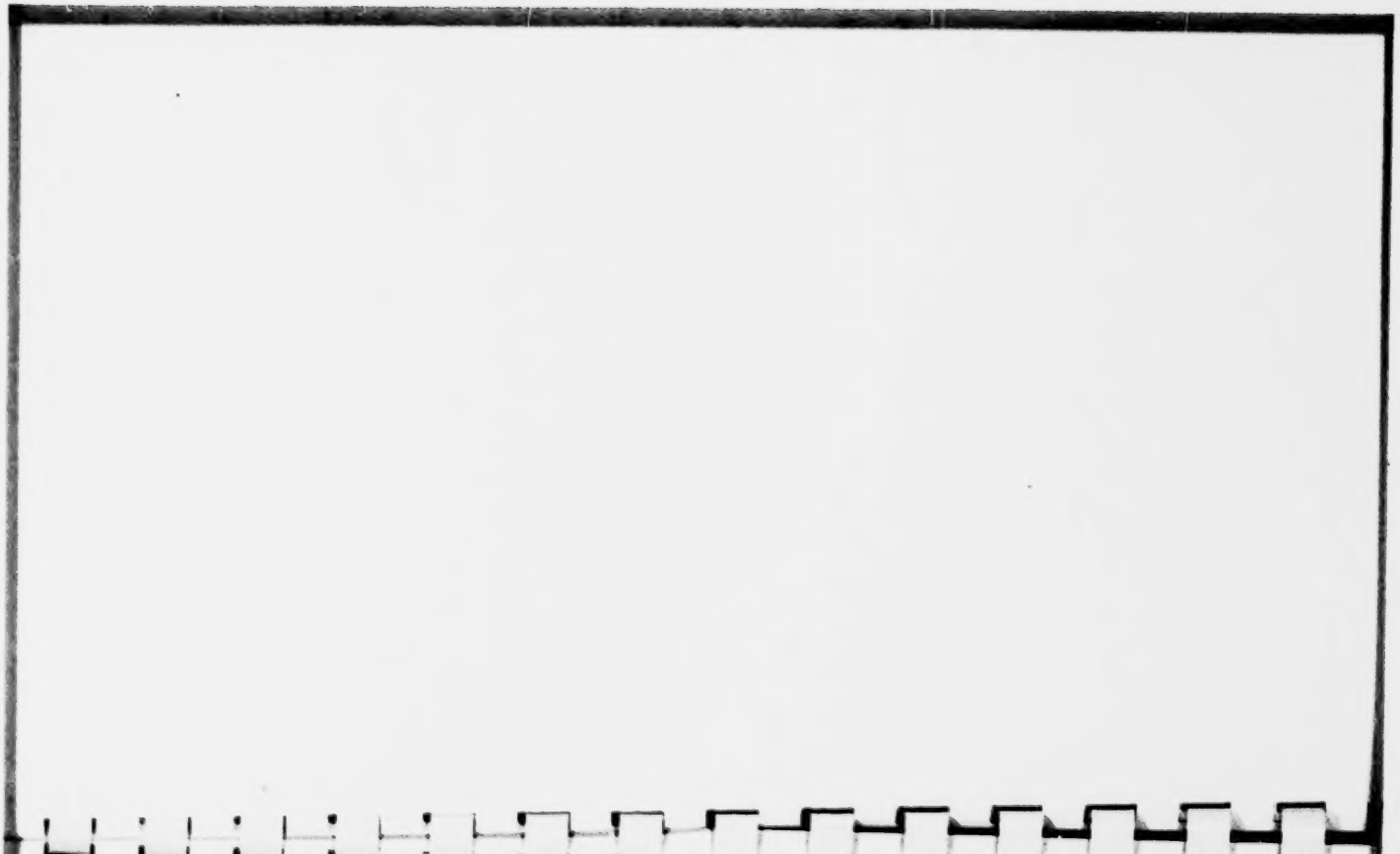
Norwood v. Harrison, ___ U. S. ___ (June 25, 1973) 41 L.W. 5094, 5096, noted that "appellees intimate that the State must provide assistance to private schools equivalent to that it provides to public schools without regard to whether the private schools discriminate on racial grounds." In response, the Court

stated:

> "Clearly, the State need not. Even as to church-sponsored schools whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in Lemon v. Kurtzman, 403 U.S. 602 (1971)."

See also footnote 7 in Norwood in which the Court explains in detail how appellees in that case, as plaintiffs in this case, "misperceive the 'child benefit' theory of our cases decided under the Religion Clauses of the First Amendment."

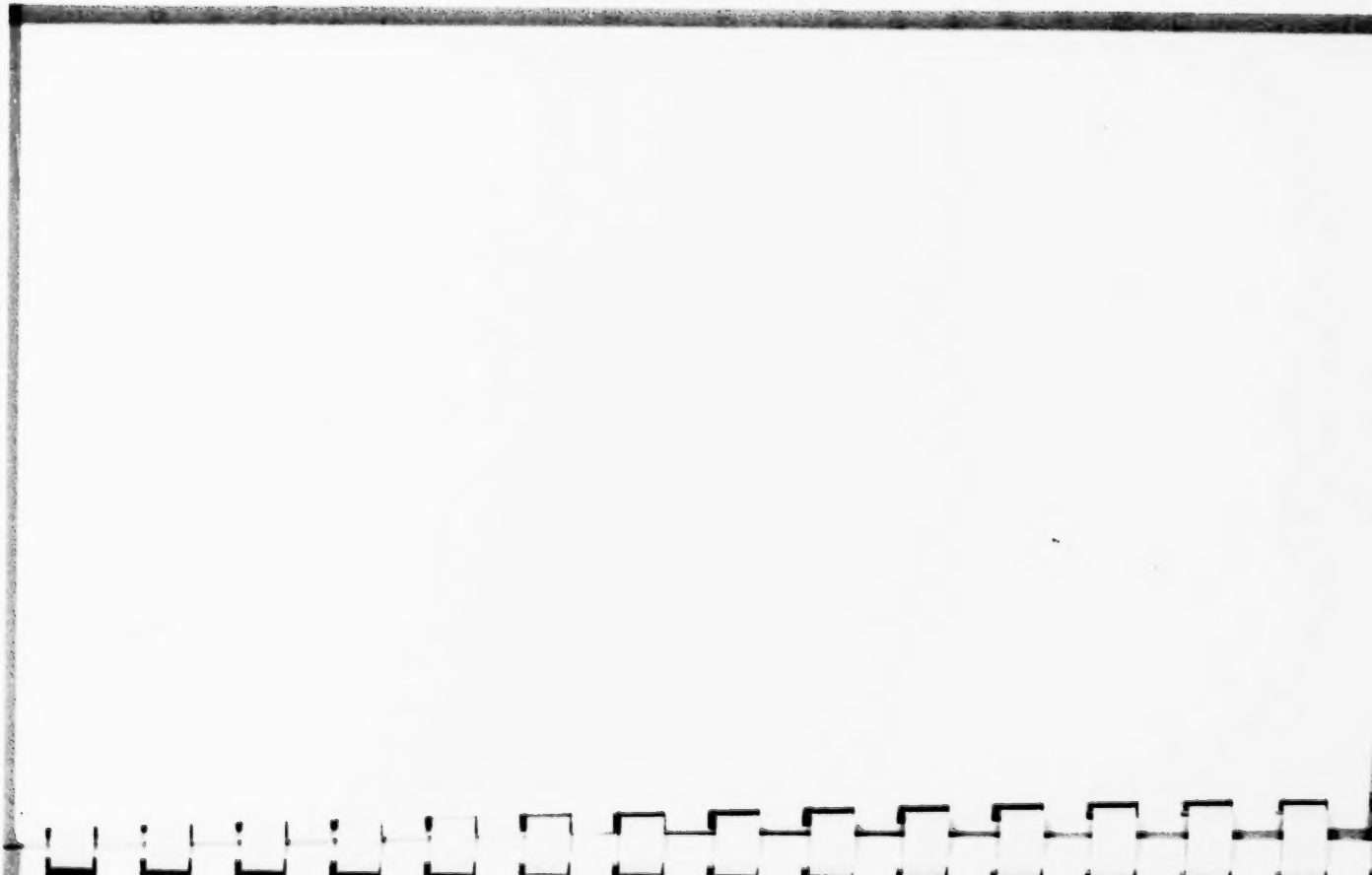
The "child benefit" theory must be considered in the context of the cases which required the Court to define permissible areas of State aid to religious institutions. The language of those cases may not be taken out of context to support the notion that a State must provide transportation for all pupils, re-



gardless of whether they attend a religious or public school. We do not suggest that the fact that state benefits are distributed to children rather than to schools, and the fact that the benefit is essentially nonreligious in character may not be relevant in regard to proper analysis of other constitutional questions presented in this case; we conclude only that the "child benefit theory," as set out in Everson and Allen, standing alone, does not support plaintiffs' basic contention.

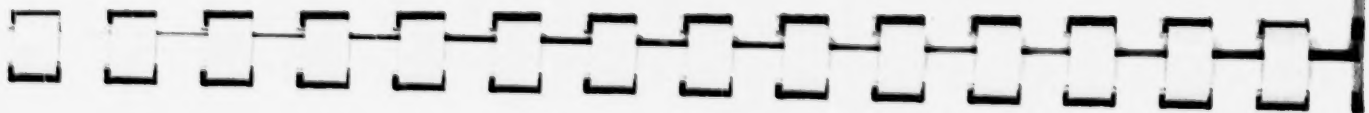
B. Equal Protection

Plaintiffs contend that the transportation of school children is part of a comprehensive statutory and regulatory scheme designed to provide for the safety and welfare of children traveling to and from school. Plaintiffs argue that the

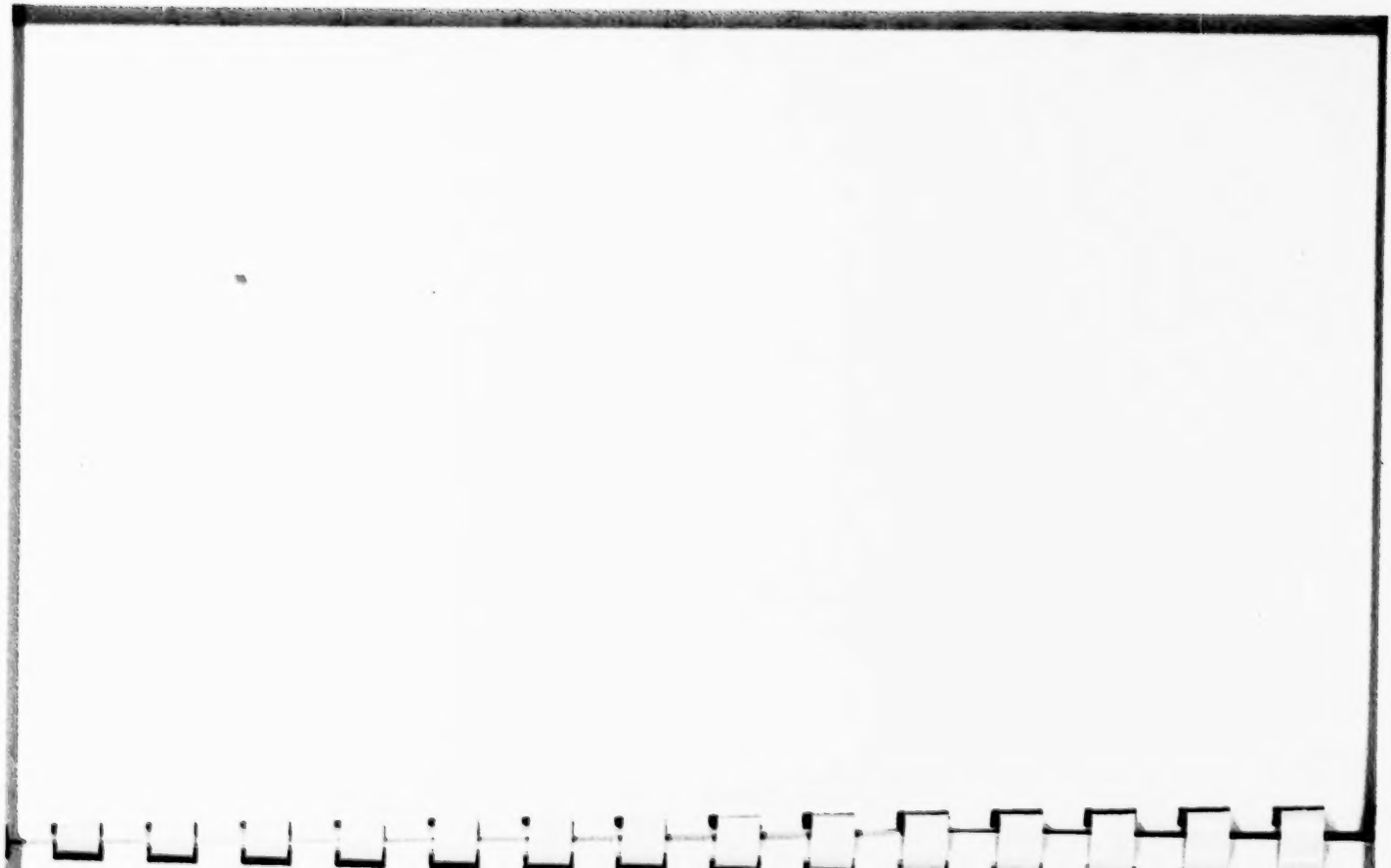


fact that this public service is denied to the plaintiff children solely because they are enrolled in a nonpublic school "is an arbitrary and unreasonable classification and unconstitutionally denies plaintiffs equal protection of the laws" as prohibited by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs argue further that the classification involved is invidious because it infringes upon plaintiffs' fundamental right to select the school of their choice and to freely exercise their religion and that, therefore, a compelling state interest must be shown to justify the classification.

The plaintiffs direct attention to language in Shapiro v. Thompson, 394 U. S. 618, 634 (1969), which states that "any classification which serves to penalize



the exercise of [a constitutional right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." The constitutional right claimed is the right to attend a church-sponsored school, as defined in Pierce v. Society of Sisters, 268 U. S. 510 (1925). Plaintiffs in this case, as appellees in Norwood v. Harrison, fail to recognize the limited scope of Pierce. In Norwood, appellees suggested that "the rights of parents under Pierce would be undermined were the lending of free textbooks denied to those who attend private schools -- in other words, that school children who attend private schools might be deprived of the equal protection of laws were they invidiously classified under the state textbook program simply because their parents had

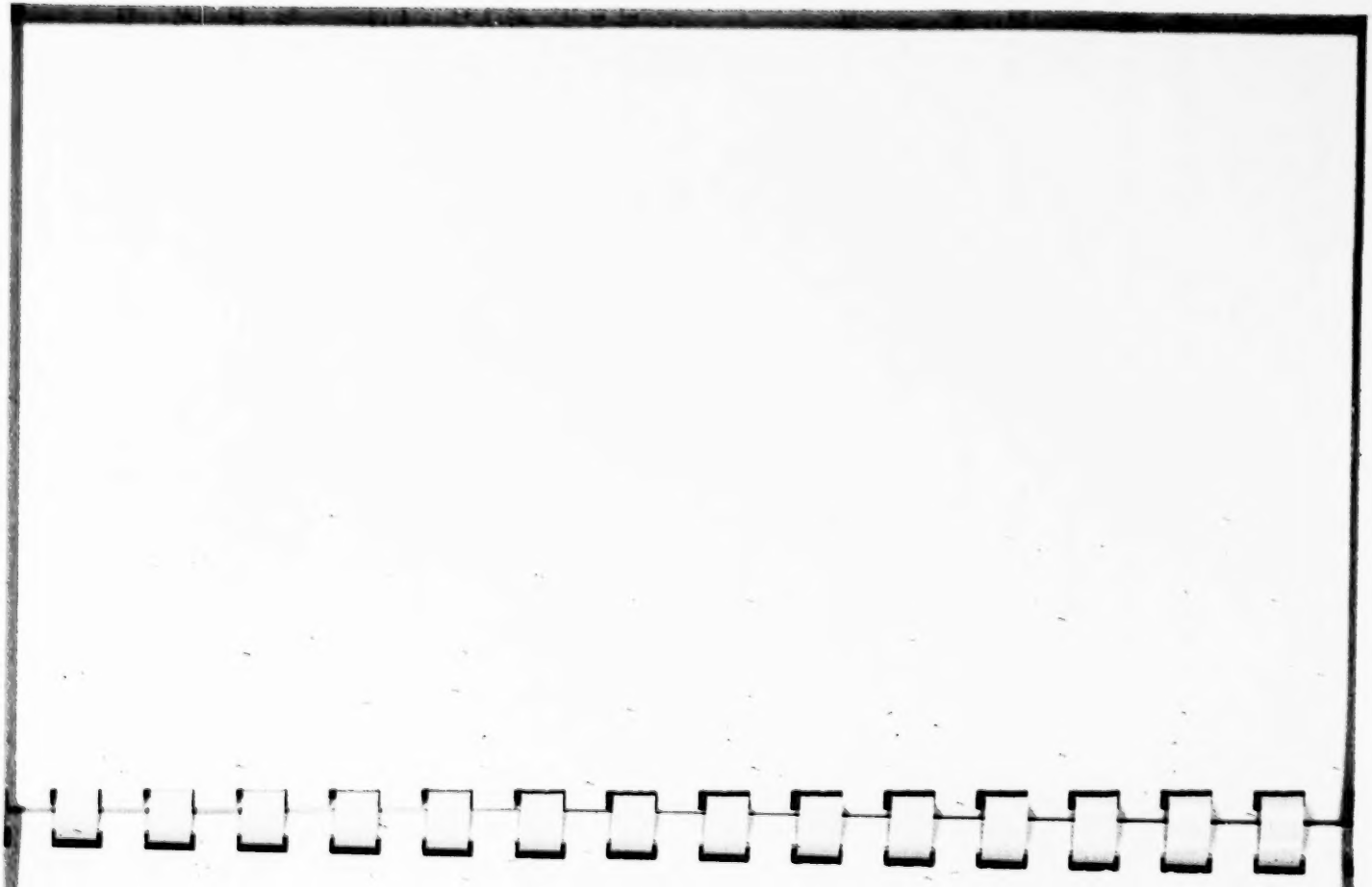


exercised the constitutionally protected choice to send their children to private schools." [41 L.W. at 5096].

Chief Justice Burger pointed out in Norwood that Pierce "said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise." He added:

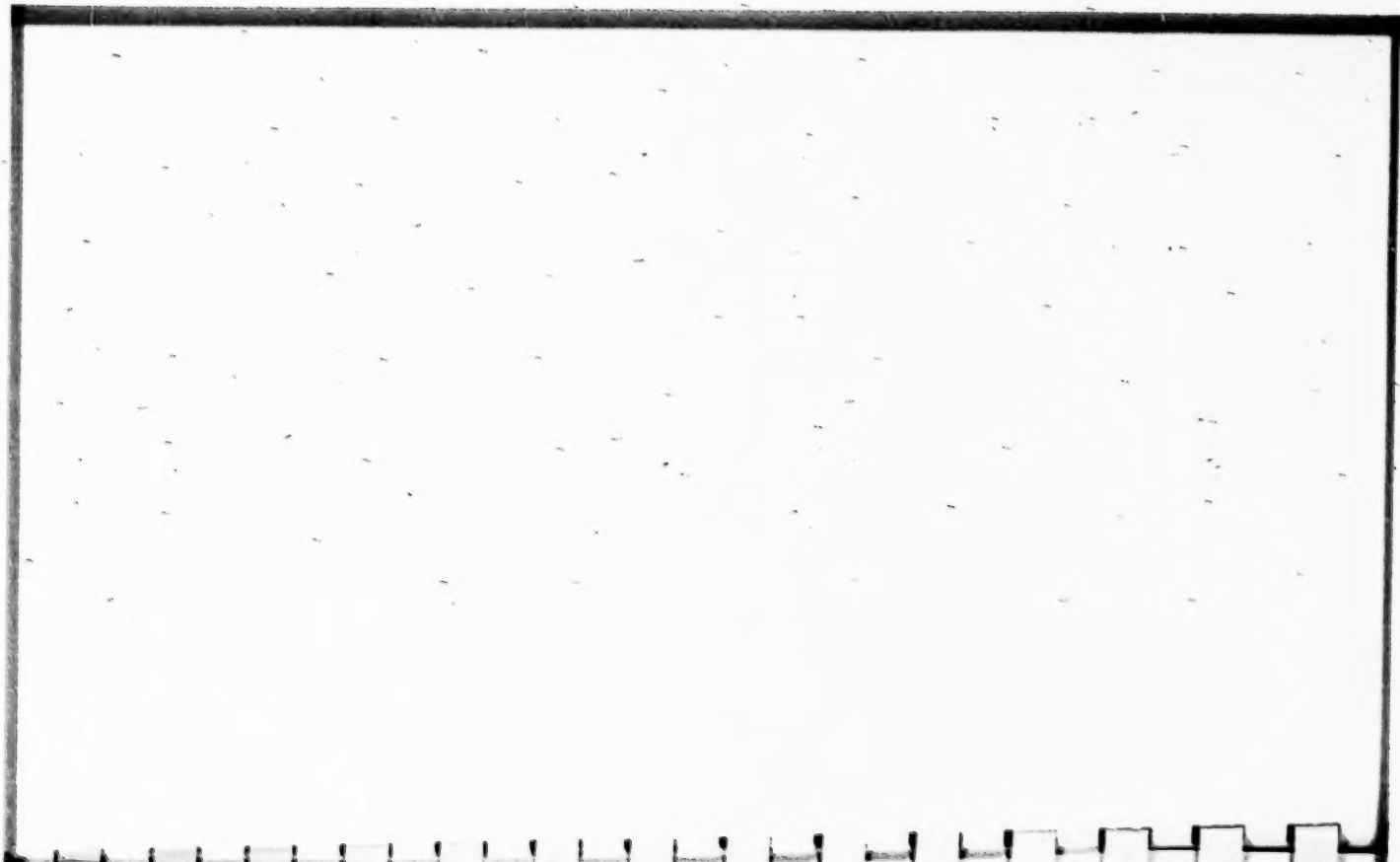
> "It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid. [41 L.W. at 5096]."

San Antonio Independent School District v. Rodriquez, ___ U. S. ___ (March 21, 1973) 41 L.W. 4407, which held that education was not a federally protected



constitutional right, was cited and relied upon in Norwood. If one's right to a public school education is not within the protection of the Constitution, certainly it cannot be said that one has a federally protected constitutional right to a parochial school education, nor a federally protected constitutional right to receive free public transportation to and from parochial schools.

In regard to the appropriate standard to be applied in a case involving public education, Rodriquez concluded that "this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights."



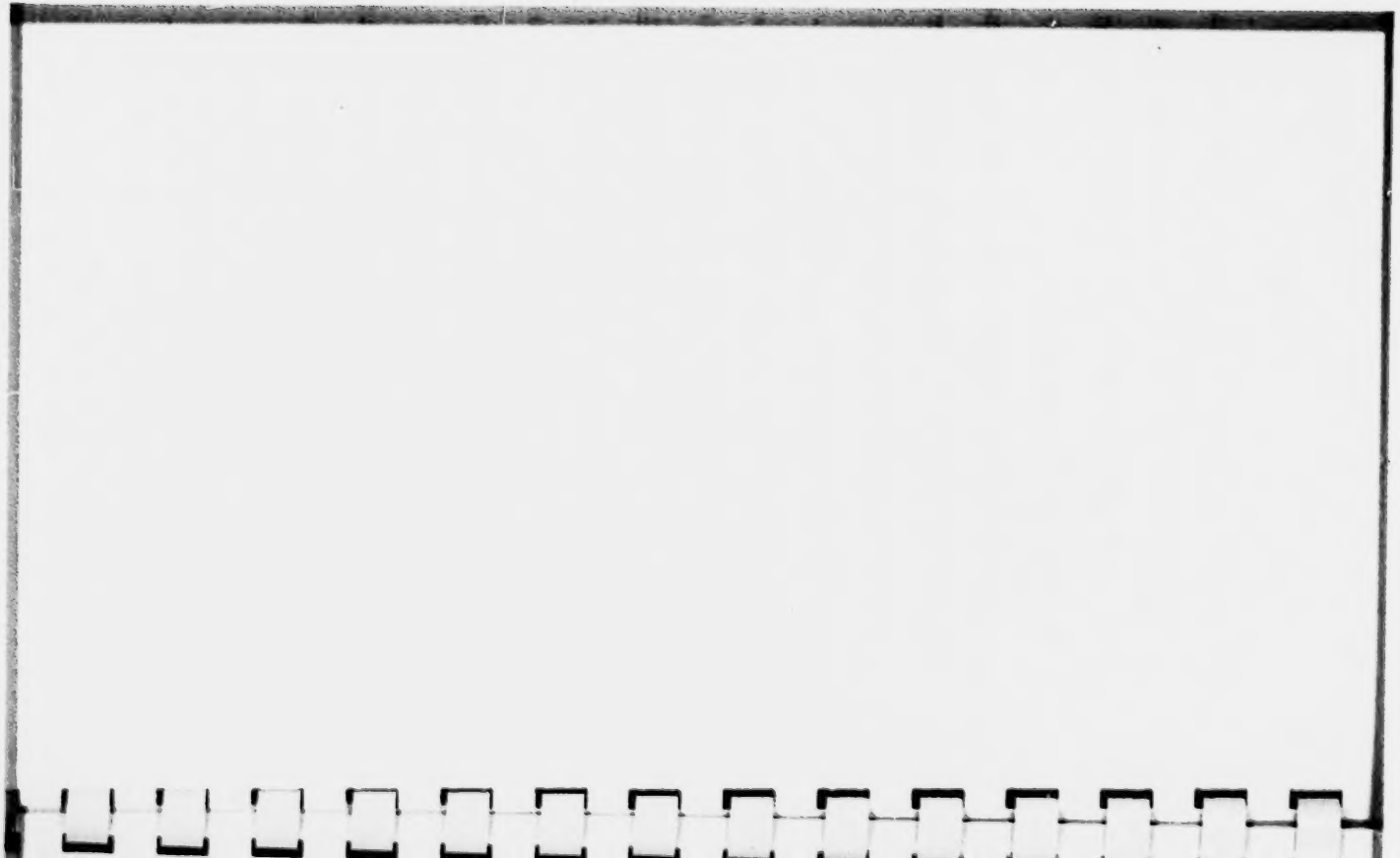
[41 L.W. at 4419].

We conclude, consistent with the rationale of Rodriquez, that the proper standard to be applied is the traditional test set out in McGowan v. Maryland, 366 U. S. 420 (1961): "The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." Plaintiffs therefore have the burden of showing that the classification does not reasonably promote a valid State objective. Plaintiffs must establish as a matter of law that the State of Missouri's decision to promote the separation of church and state by refusing to provide school bus transportation to church-sponsored school pupils when it does provide that service to public school pupils is irrational,

arbitrary, and capricious. We find and conclude that the State's classification is not irrational, but promotes a legitimate State purpose.

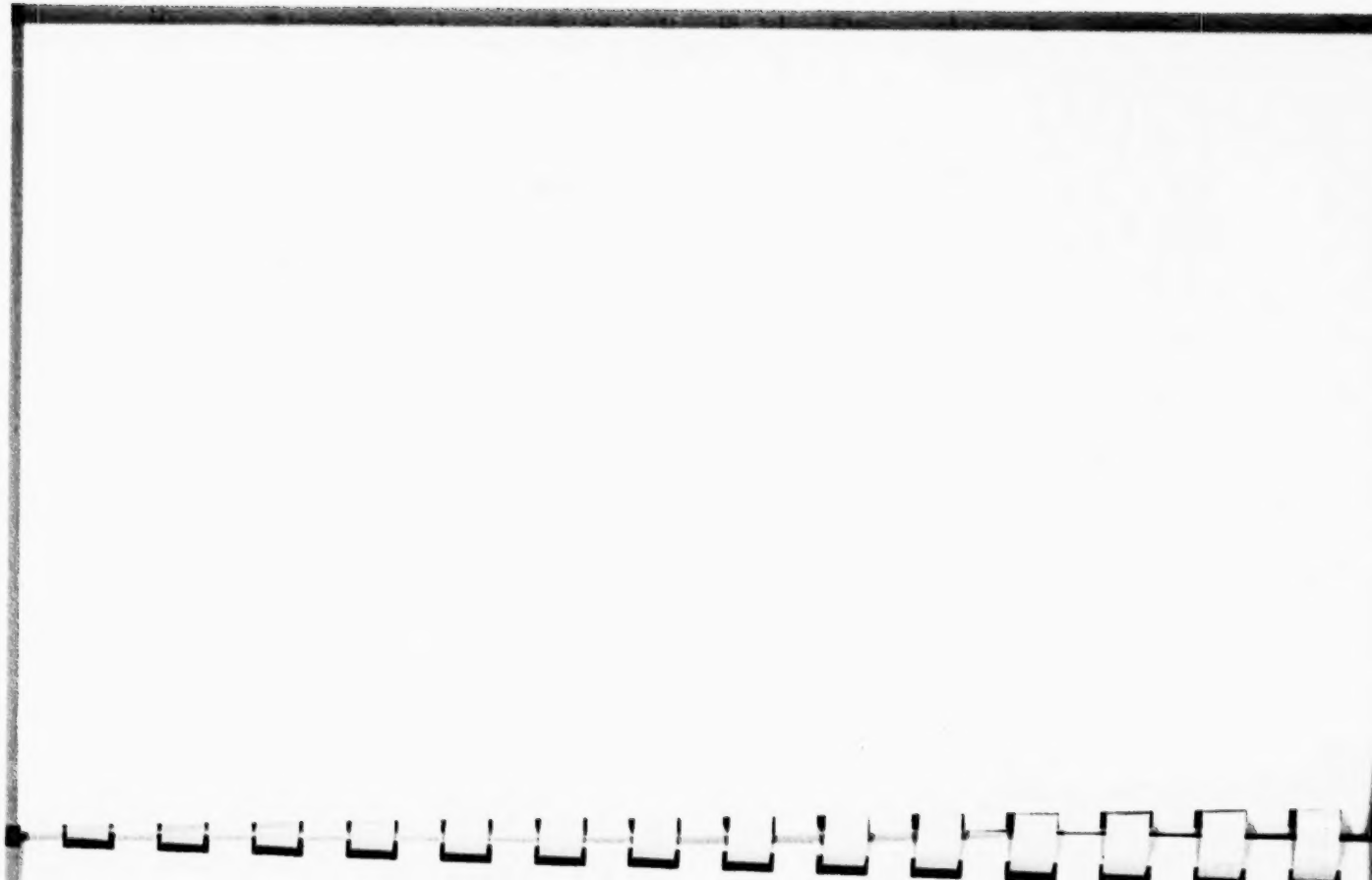
Missouri has a long history of maintaining a very high wall between church and state. Much of that history is reviewed in Harfst v. Hoegen, 349 Mo. 808, 163 S.W. 2d 609 (en banc, 1942), a case cited in footnote 7 in one of the concurring opinions in Lemon v. Kurtzman, ___ U. S. ___ (June 28, 1973) 41 L.W. 4467. That case reviewed the numerous constitutional provisions relating to the separation of church and state and pointed out that Missouri's Constitution "goes even farther than those of some other states." That case concluded:

> "The constitutional policy of our State has decreed the absolute separation of church and



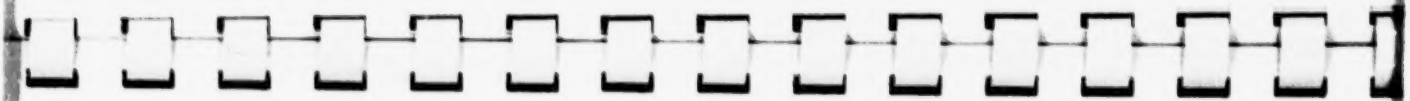
> state, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. [163 S.W. 2d at 614]"

The Constitution of Missouri, Section 5, Art. IX, provides that tax revenues for schools "shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever." In McVey v. Hawkins, 258 S.W. 2d 927 (Mo., 1953), the Supreme Court of Missouri en banc held that the transportation of children attending private schools provided in Section 165.140, R.S.Mo., 1949, was prohibited by the Constitution of Missouri, 1945. In the general revision of Missouri school laws in 1963, the statute providing for the transportation of private school pupils was deleted.



The current school laws relating to transportation, Section 167,231, et seq., R.S.Mo., therefore, can only be interpreted as permitting transportation only to public school pupils. Missouri, therefore, does have an avowed purpose to prevent State aid to church-sponsored schools.[1]

A three-judge district court in the Eastern District of Missouri held that this purpose, when implemented to prohibit the use of public funds for private schools, was legitimate and constitutional in Brusca v. State of Missouri, ex rel. State Board of Education, 332 F. Supp. 275 (E.D. Mo., 1971), aff'd. 405 U. S. 1050 (1972). Plaintiff in that case made the argument that failure to provide funding out of tax revenues for private schools while providing such

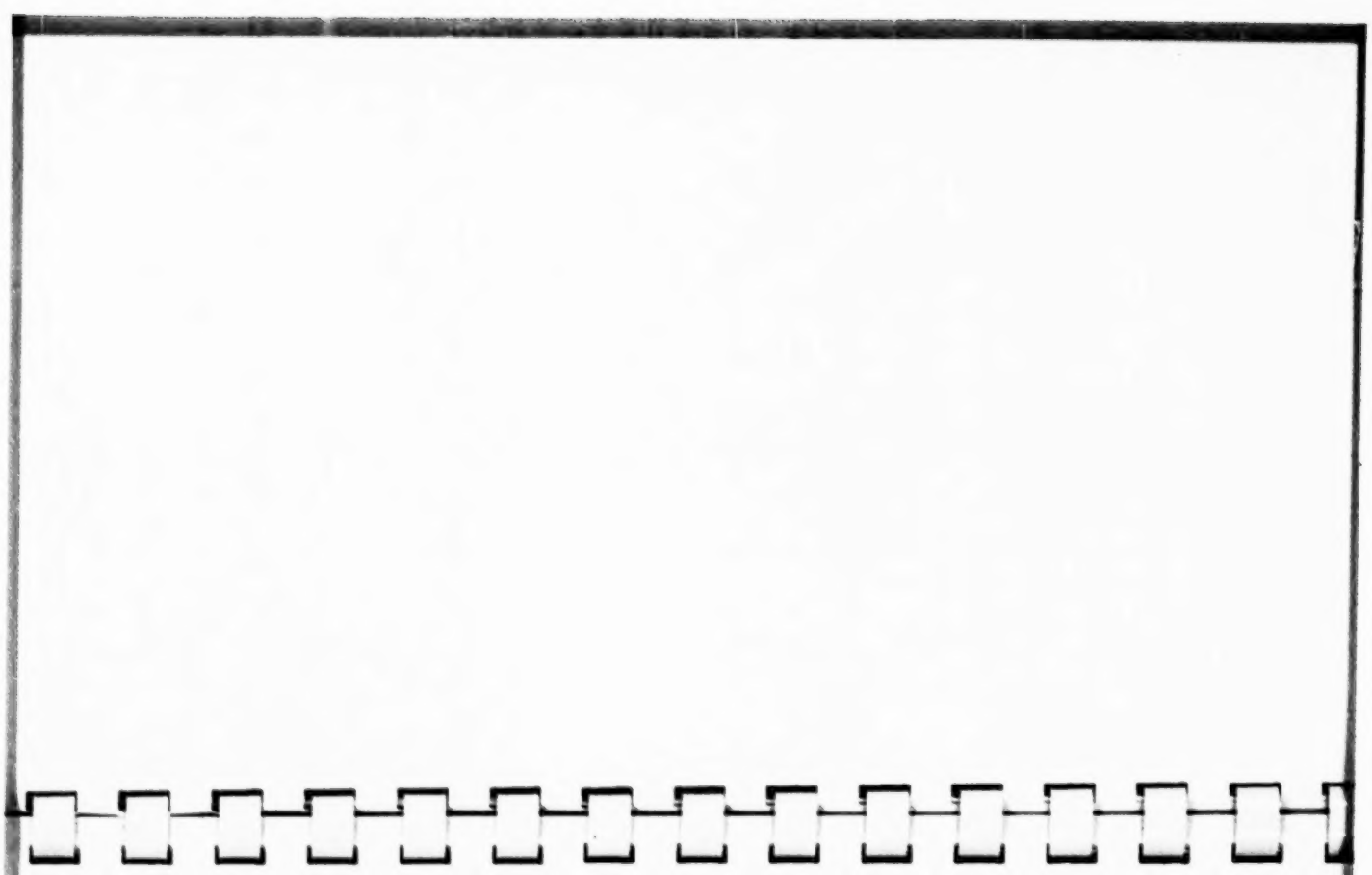


funding for public schools was violative of the Equal Protection Clause. The court did not find the argument persuasive:

> "We find nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction. So long as no invidious discrimination exists, the courts may not interfere. Cf. McGowan v. Maryland, 366 U.S. 420. Here, there is no discrimination in the legal sense. All children of every or no religious denomination have the same right to attend free secular public schools maintained with tax funds. The fact that a child or his parent for him voluntarily chooses to forego the exercise of the right to educational benefits provided in the public school systems does not deprive him of anything by state action. [332 F. Supp. at 279]."

Plaintiffs base a large portion of their argument on their reading of Everson v. Board of Education, supra, and Board of Education v. Allen, supra.

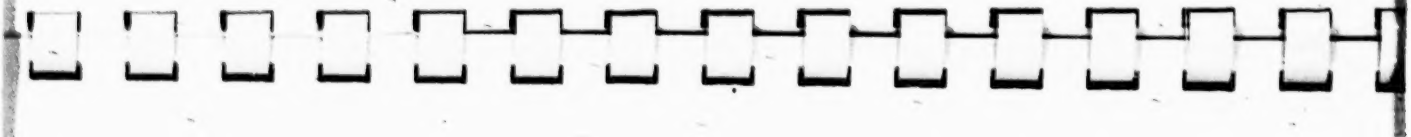
The Court's discussion of those



cases in Lemon v. Kurtzman, 403 U. S. 602 (1971), and its most recent church and state cases, Norwood v. Harrison, ___ U. S. ___ (June 25, 1973) 41 L.W. 5094; Levitt v. Committee for Public Education and Religious Liberty, ___ U. S. ___ (June 25, 1973) 41 L.W. 5091; Sloan v. Lemon, ___ U. S. ___ (June 25, 1973) 41 L.W. 5181; Committee for Public Education and Religious Liberty v. Nyquist, ___ U. S. ___ (June 25, 1973) 41 L.W. 5153; and Lemon v. Kurtzman, ___ U. S. ___, (April 2, 1973) 41 L.W. 4467, make further discussion of the equal protection question redundant.

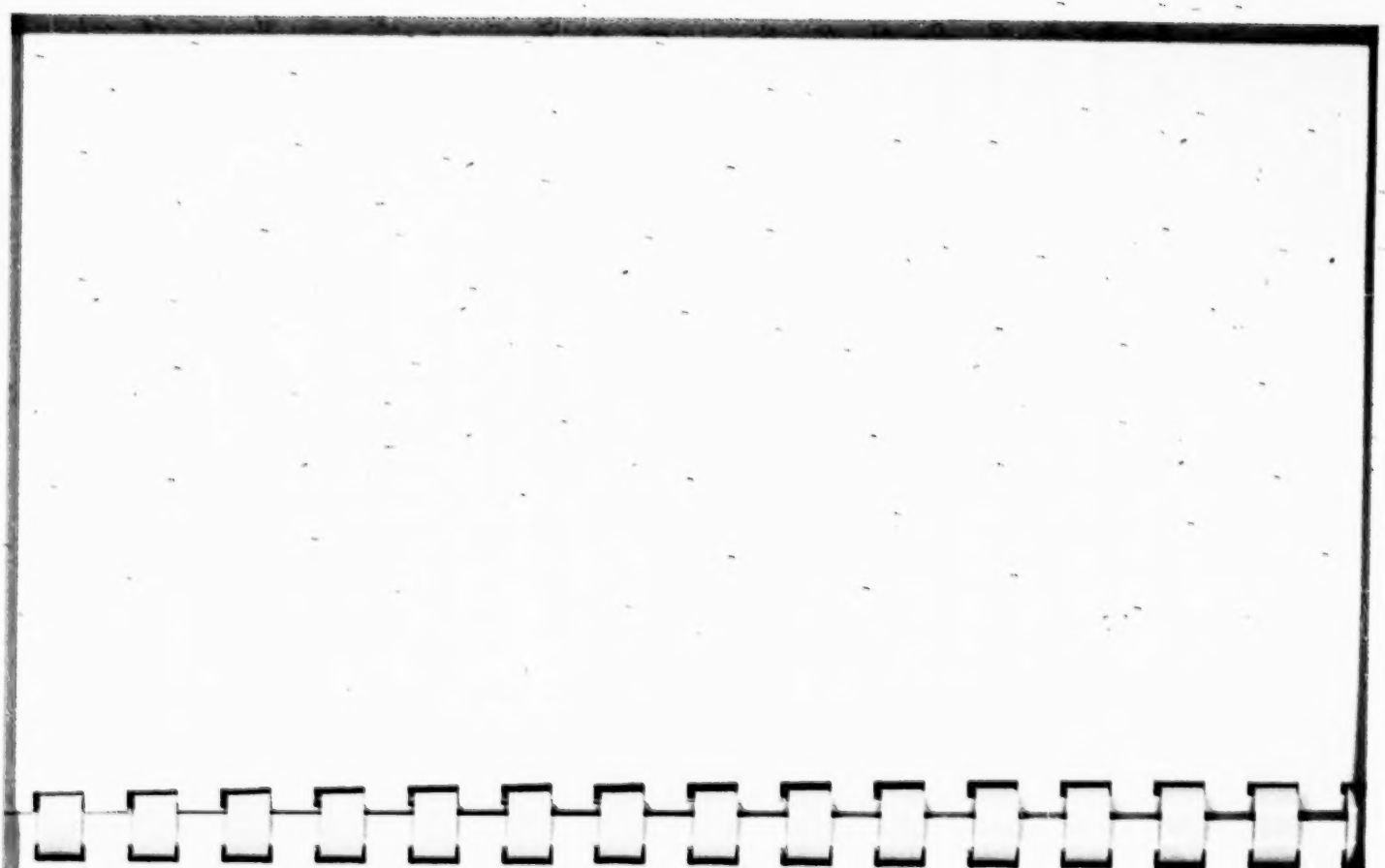
C. Due Process

Three of the six points of plaintiffs' brief purport to present due process questions. Plaintiffs contend that they were denied due process (a) "for the



reason that in order to obtain the benefits of this public service (transportation of school children) plaintiffs must wholly forego their fundamental constitutional right to select the school of their choice;" (b) "for the reason that the State conditions the receipt of the benefits of this public service (transportation of school children) upon plaintiffs' foregoing the fundamental constitutional right to free exercise of their religion;" and (c) for the reason that the denial to plaintiffs of bus service "on an equal basis with other citizens constitutes the arbitrary taking of his property without compensation and deprives him of his property without due process of law."

Plaintiffs cite and rely primarily on their reading of Pierce v. Society of



Sisters, 268 U. S. 510 (1925); and Sherbert v. Verner, 374 U. S. 398 (1963). The cases upon which plaintiffs place principal reliance make clear that the due process label which plaintiffs place on the arguments made under these three points is quite incidental and that plaintiffs' reference to due process more or less follows the pattern apparently followed in Two Guys v. McGinley, 366 U. S. 582 (1961). That case involved an equal protection attack upon Pennsylvania's Sunday closing law. Plaintiffs' contentions were summarized on page 589 and the Court noted in footnote 5 on that page that "concomitantly, appellant states the statute violates due process for these same reasons." Regardless of what label may be placed on plaintiffs' argument, it is clear that the rationale

of the cases relied upon do not afford plaintiffs any ground for relief.

The foundation upon which plaintiffs' school choice argument rests is that Pierce either created or recognized the notion that the constitutional prohibition which voids a state requirement that all children attend a public school commands a further conclusion that there is something in the Constitution which requires that all services, specifically, bus transportation, which the State may decide to furnish public school pupils must also be furnished parochial school pupils.

Pierce, in our judgment, cannot be so broadly read. Indeed, the Court in Norwood v. Harrison stated that "the Court's holding in Pierce is not without limits." Indeed, Norwood expressly

adopted Mr. Justice White's observation in his concurring opinion in Wisconsin v. Yoder, 406 U. S. 205, 239 (1972), that Pierce "held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools." [41 L.W. 5096]. When the Pierce foundation upon which plaintiffs' first "due process" argument is based is thus removed, all that remains to support plaintiffs' argument is their reading of Sherbert. Indeed, Sherbert is the sole basis for the plaintiffs' second "due process" argument, other than a number of state cases, which are clearly inapposite.

But Sherbert also presented a very narrow question under the Free Exercise clause and does not support plaintiffs' argument that the receipt of a public

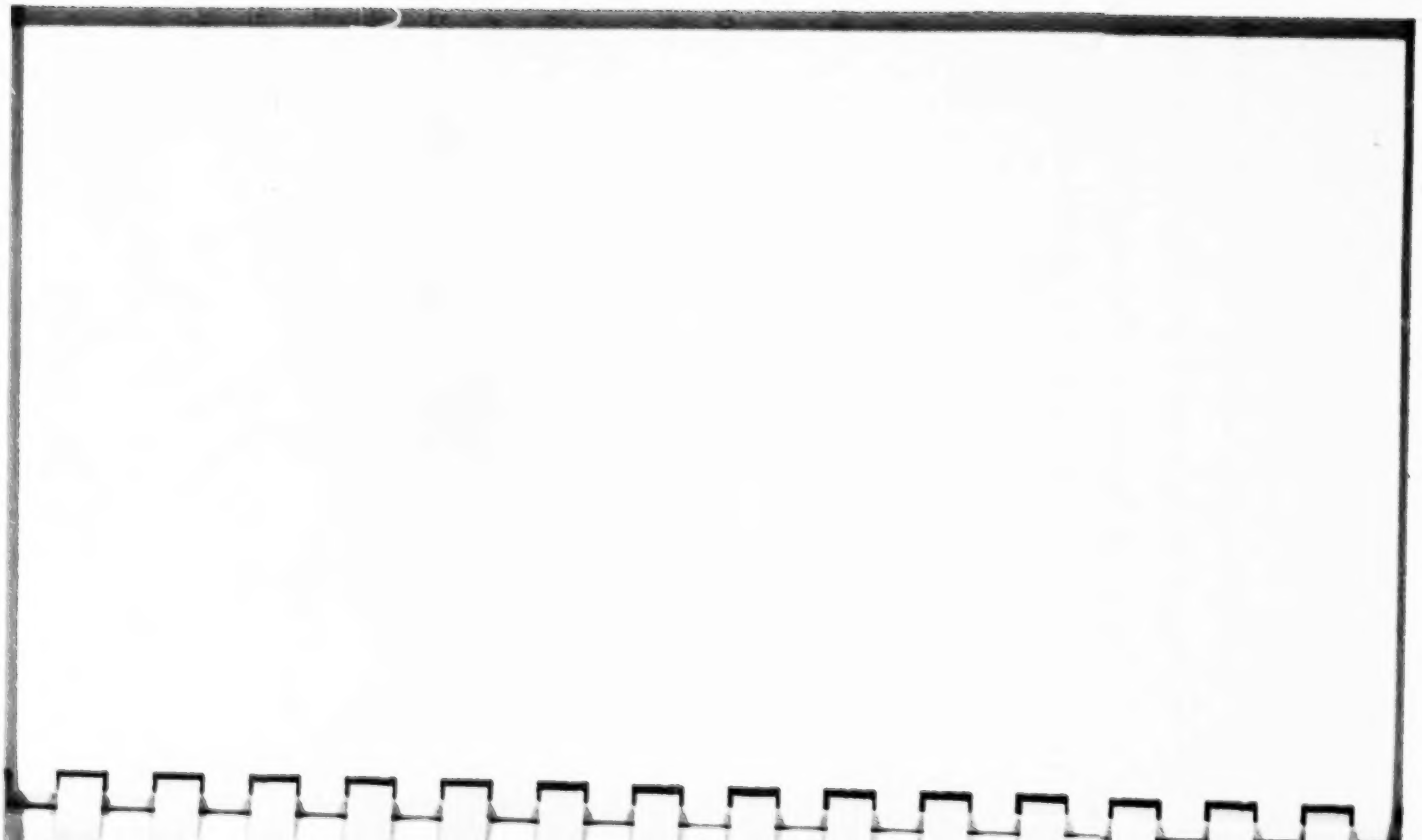
service is unconstitutionally burdened. The Court made clear in Sherbert that:

> "Our holding today . . . but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." Everson v. Board of Education, 330 U.S. 1, 16. (emphasis the Court's.) [374 U.S. at 410]."

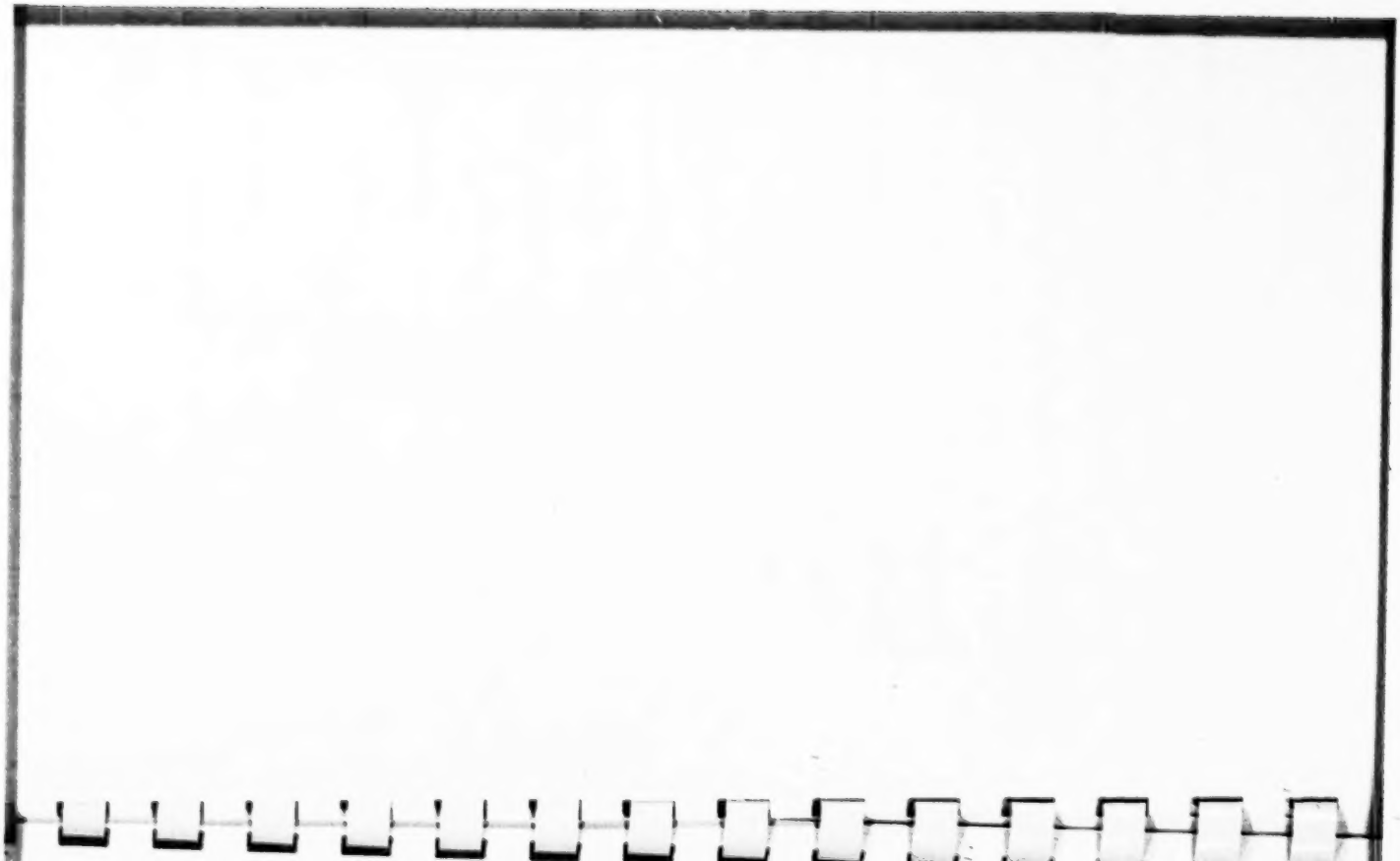
Sherbert involved a request for dispensation from a general regulatory law; not a request or demand for a public service. While the exemption or dispensation would clearly result in some aid to a particular individual, it did not involve the expenditure of state funds which would, in fact, indirectly aid a religious institution. The Court simply did not have the latter question before it. Justice Douglas appropriately

pointed out in his concurring opinion, that "this case does not involve the problems of direct or indirect state assistance to a religious organization." [374 U. S. at 413].

In the final analysis, it must be recognized that Sherbert simply held that the disqualification of the Seventh Day Adventist plaintiff as a beneficiary under the South Carolina Unemployment Compensation Act could not withstand constitutional challenge because South Carolina could not justify that disqualification by a "compelling State interest in the regulation of a subject within the State's constitutional power to regulate . . .," within the meaning of the familiar standard articulated in NAACP v. Button, 371 U. S. 415 at 438 (1963). Braunfeld v. Brown, 366 U. S. 599 (1961),



also involving the Free Exercise clause, represents another case in the same line of cases which reached a different result. Braunfeld repeatedly recognized that a valid State statute may well place an economic burden upon persons who may wish to follow their religious convictions. Chief Justice Warren stated that the Pennsylvania closing law, so far as members of the Orthodox Jewish faith, "operates so as to make the practice of their religious beliefs more expensive." The Court concluded, however, that "[f]ully recognizing that the alternatives open to appellants and others similarly situated . . . may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a reli-



gious practice itself unlawful." [366 U. S. at 605-606].

Braunfeld makes clear that the economic effect of a statute is not an appropriate test for determining whether the challenged legislation violates the Constitution. The Court took note of the fact that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference" and that "[c]onsequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions." [366 U. S. at 606]

United States v. O'Brien, 391 U. S. 367 (1968), rejected a First Amendment

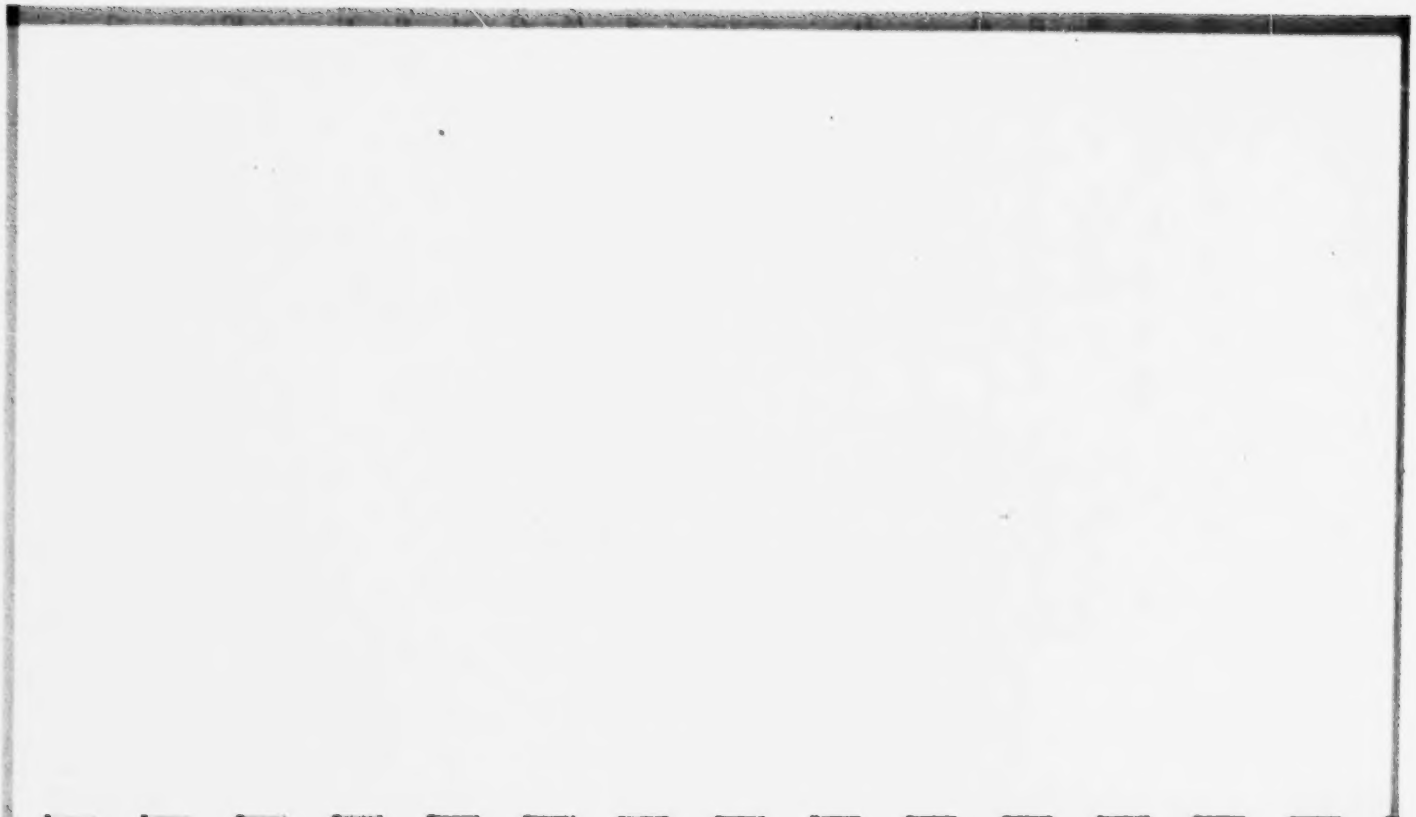
attack upon the 1965 amendment to the Selective Service Act. Apparent limitations upon First Amendment freedoms were held to be justified by the quality of the governmental interest involved. The Court commented on the long line of cases of which Sherbert is only one, when it stated that:

> "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. [391 U.S. at 376-377]"

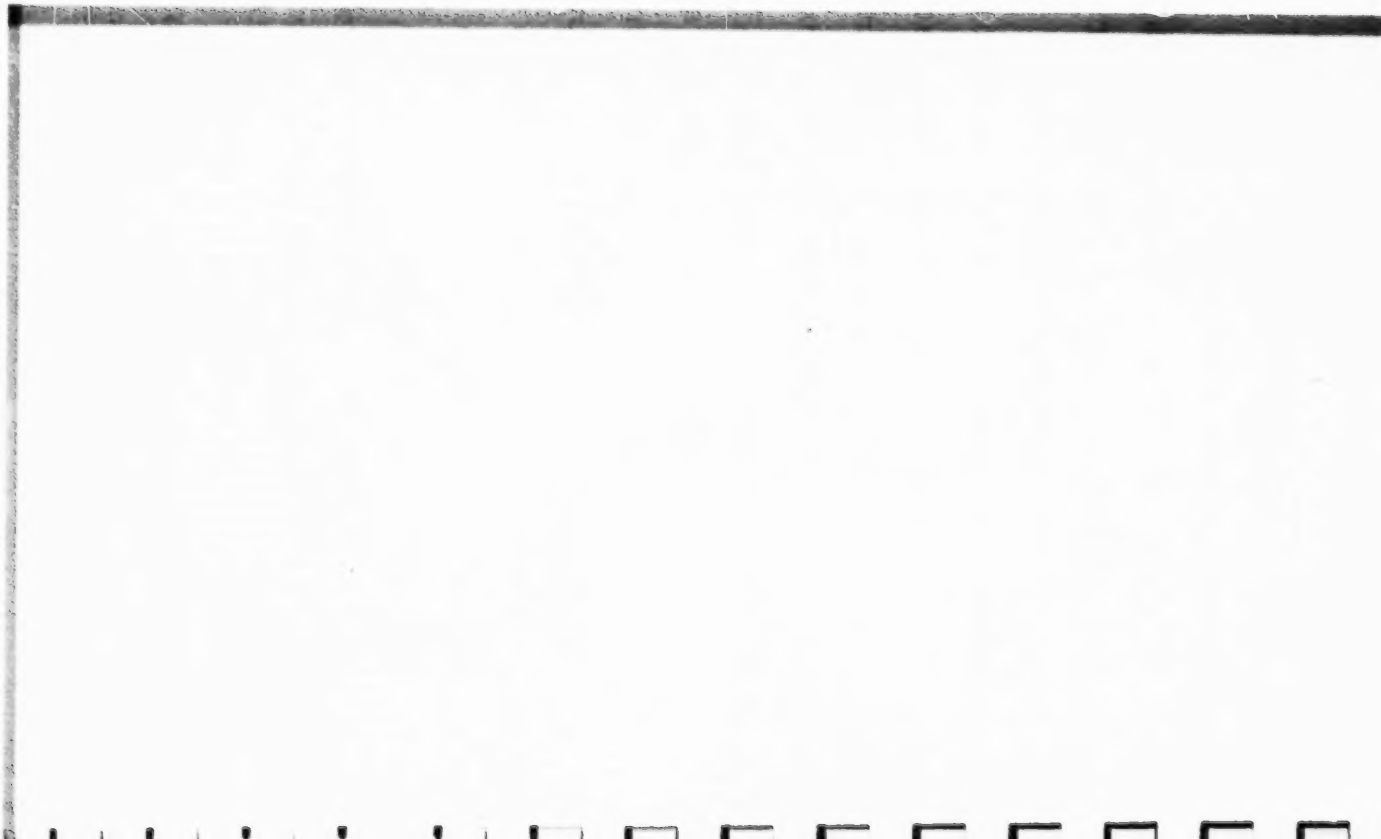
The most recent case which, as a

matter of result, fell on the same side of the line as Sherbert, is Wisconsin v. Yoder, 406 U. S. 205 (1972). That case concluded that the State's interest in universal education was not sufficient to justify the impingement upon the religious convictions of the Old Order Amish against formal education beyond the eighth grade. Yoder added to the descriptive terms used to characterize the quality of the governmental interest which must appear. Chief Justice Burger stated that "the essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can over-balance legitimate claims to the Free Exercise of religion." [406 U. S. at 215]

We conclude without hesitation that

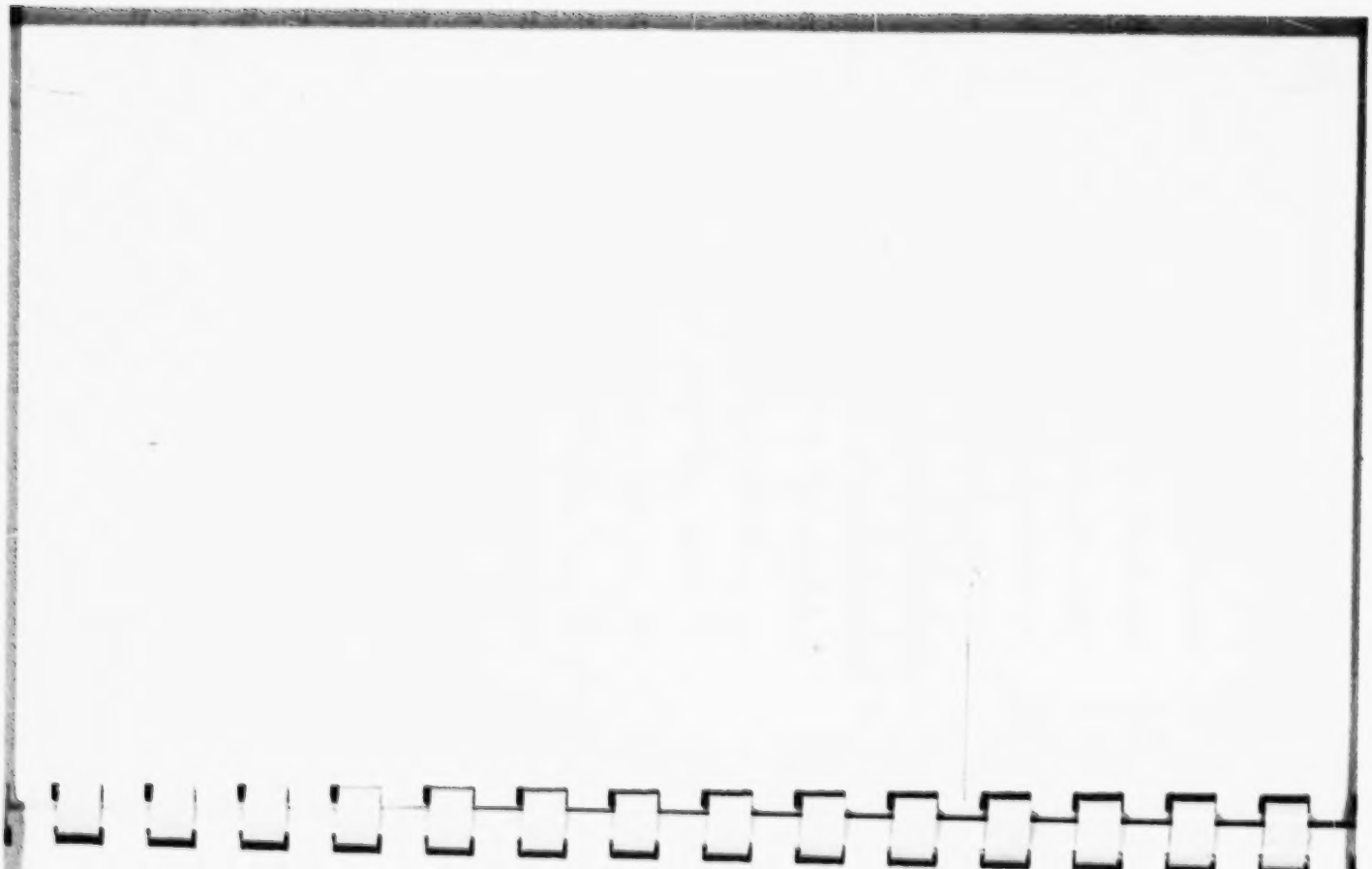


the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a "compelling state interest in the regulation of a subject within the State's constitutional power," within the standard enunciated in NAACP v. Button, 371 U. S. 415, 438 (1963), and applied in Sherbert. That interest, in our judgment, satisfies any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States. We likewise find and conclude that Missouri's interest in that subject is within Missouri's constitutional power and that such interest may properly be described as an "interest of



the highest order" within the meaning of Yoder and within the meaning of all the other various descriptive terms set forth in United States v. O'Brien above quoted.

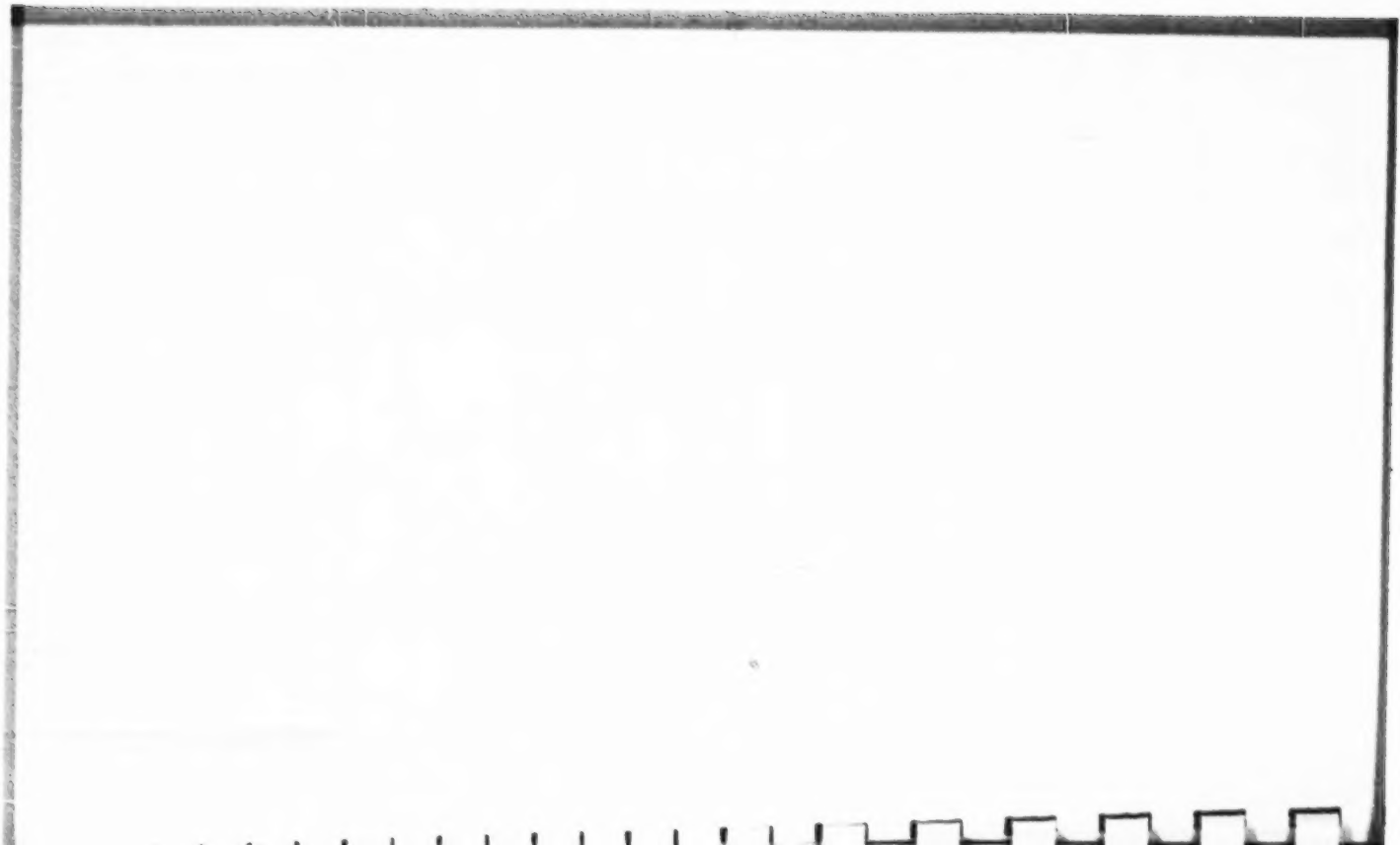
The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question. The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter. For example, Walz v. Tax Commission, 397 U. S. 664 (1970), concluded that a State may or may not tax church property. "The limits of permissible state accommodation to religion



are by no means co-extensive with the noninterference mandated by the Free Exercise Clause" [397 U. S. at 673]. Likewise, Tilton v. Richardson, 403 U. S. 672 (1972), established that a State may or may not grant funds to church-related schools for construction of buildings for secular use.

Much the same argument as that made by plaintiffs in this case was made in Di Censo v. Robinson, 316 F. Supp. 112 (D. R.I. 1970), aff'd. 403 U. S. 602 (1972). The Court there rejected the claim that free exercise benefits which flow from aid to parochial education should prevail over the establishment clause values protected by strict separation, stating:

> "We reject the notion that the Free Exercise clause demands affirmative state action to accommo-



> date . . . personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated. [316 F. Supp. at 123]."

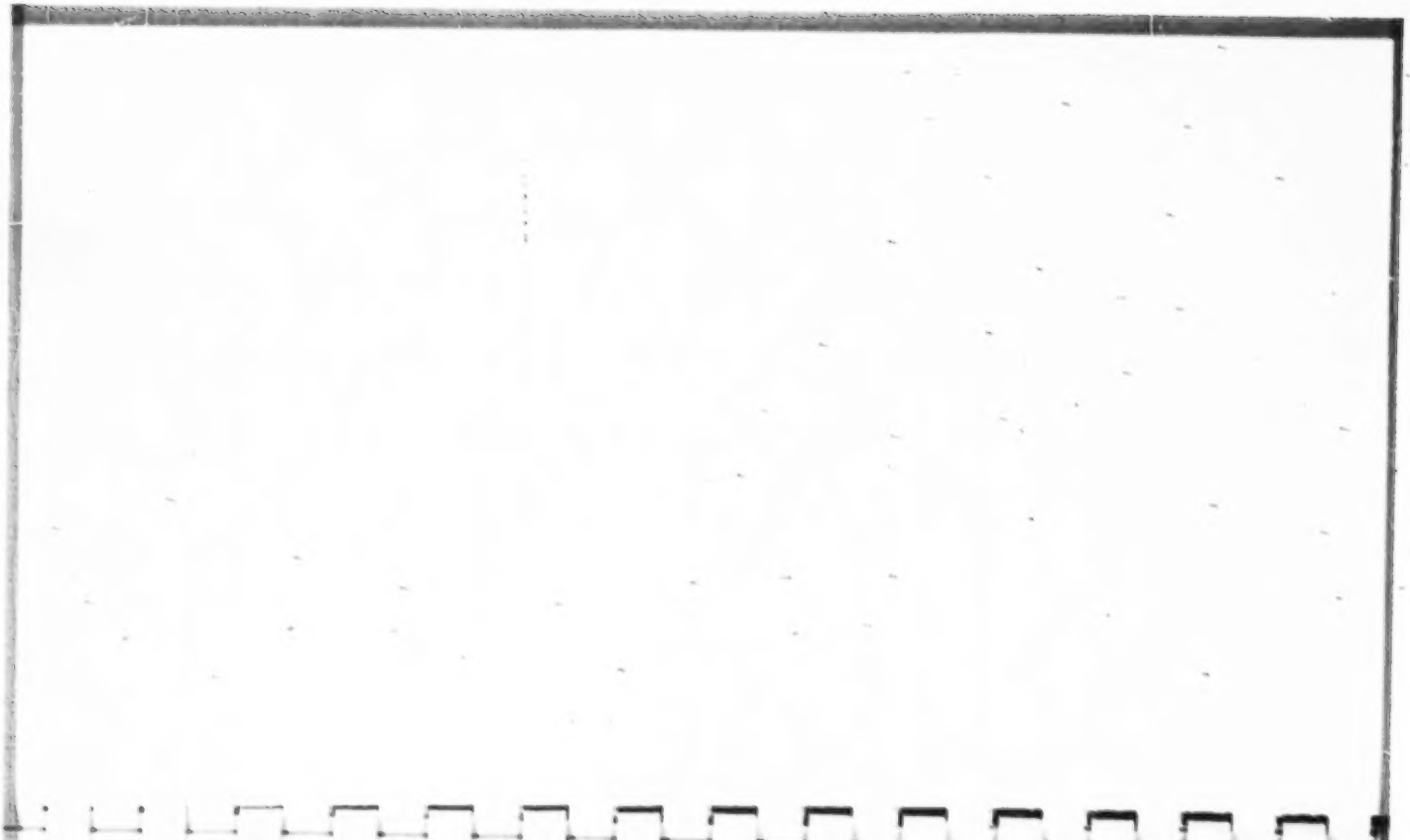
Missouri has determined that it will not extend bus transportation to parochial school students. Nothing in the federal Constitution requires that it do so. Plaintiffs' arguments under the first two of the three points under discussion are untenable.

The plaintiffs' final argument under the last point of their "due process" arguments is that there is an unconstitutional taking of the plaintiff's share of tax revenues when he does not receive benefits provided from the general tax revenues. The only case cited by the plaintiffs, Detroit Edison Co. v. East China T.P. School District No. 3, 247 F. Supp. 296, (E.D. Mich.,

1965), aff'd. 378 F. 2d 255, cert. den. 389 U. S. 932 (1967), does not support plaintiffs' novel theory. Indeed, the district court's order dismissing plaintiff's complaint was affirmed on appeal. The general principle stated in the leading case of Union Refrigerator Transit Company v. Com. of Kentucky, 199 U. S. 194 (1905), that "a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit," is applicable. Plaintiffs' last argument is untenable.

IV. CONCLUSION

We find and conclude that the Constitution of the United States does not compel the State of Missouri to provide equal transportation services to private and church-sponsored schools and that it may, as it has, elect to provide such



service only for its public schools. While we recognize that some of plaintiffs' arguments may be based upon grounds other than the First Amendment, we nonetheless deem it appropriate to state that the following language from Mr. Justice Douglas' concurring opinion in Sherbert is generally applicable to this case:

> "This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples. The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government. [398 U.S. at 412]"

Accordingly, and for the reasons indicated, it is

ORDERED AND ADJUDGED that Sections 167.231, 167.251, 163.161, 163.061, 165.011, R.S.Mo., and related statutes should be and are hereby declared not to be unconstitutional. It is further

ORDERED AND ADJUDGED that the plaintiffs' demand for an injunction enjoining the enforcement of Missouri Statutes 167.231, 167.251, 163.161, 163.061 and 165.011, R.S.Mo., should be and is hereby denied. It is further

ORDERED AND ADJUDGED that the plaintiffs' prayer for damages should be and is hereby denied.

/s/ John W. Oliver
John W. Oliver, District Judge

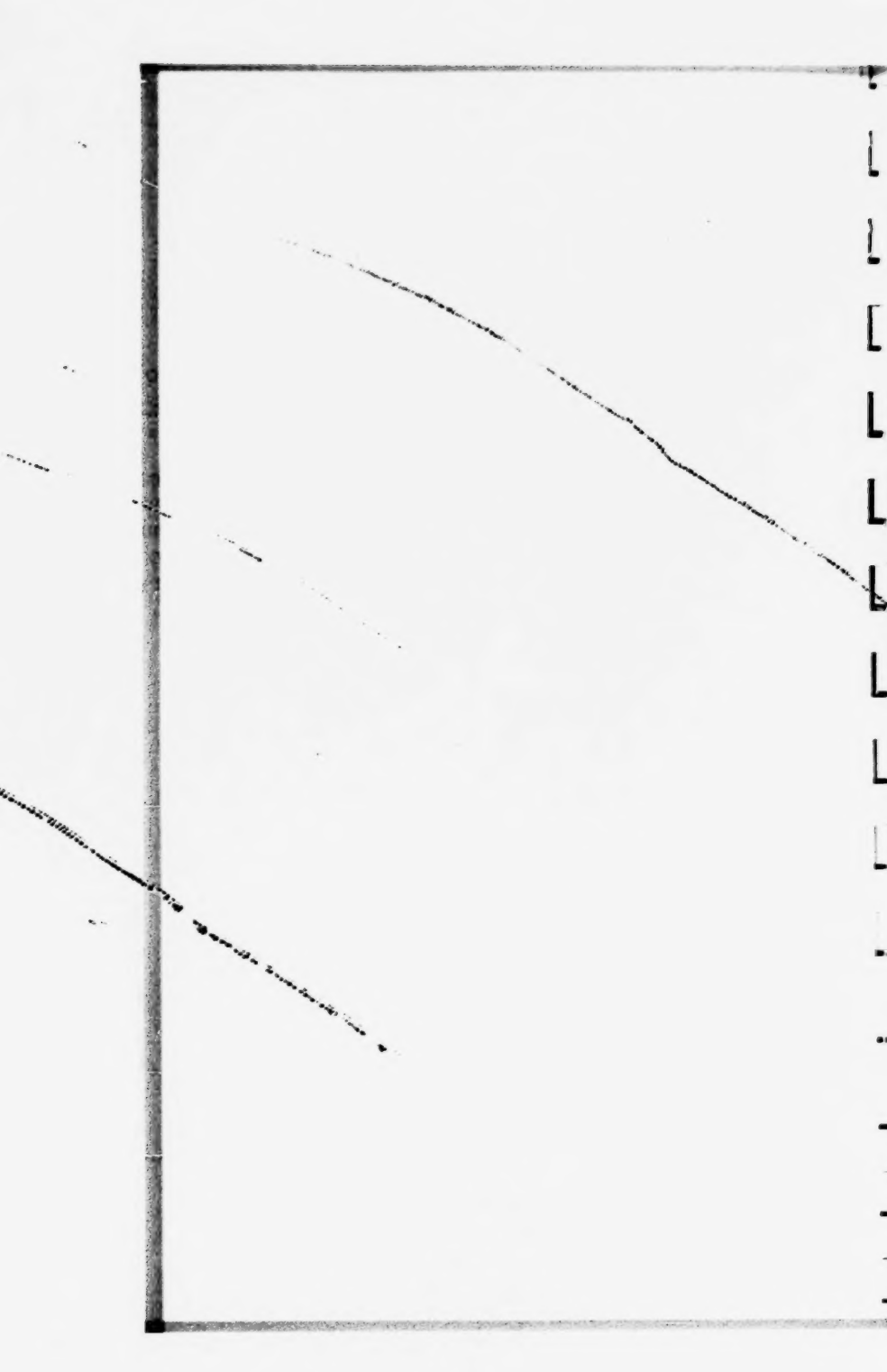
/s/ William R. Collinson
William R. Collinson, District Judge

Kansas City, Missouri
September 24, 1973

FOOTNOTES

1. [page 31]

Most recently the Supreme Court of Missouri has held in McDonough v. Aylward, No. 57,003, ___ S.W. 2d ___, (July 16, 1973), that it is not a violation of either the First or the Fourteenth Amendment of the United States Constitution to charge the plaintiffs with the payment of taxes that are used only for public schools and not for the church-sponsored school to which he sends his children.



No. 1703

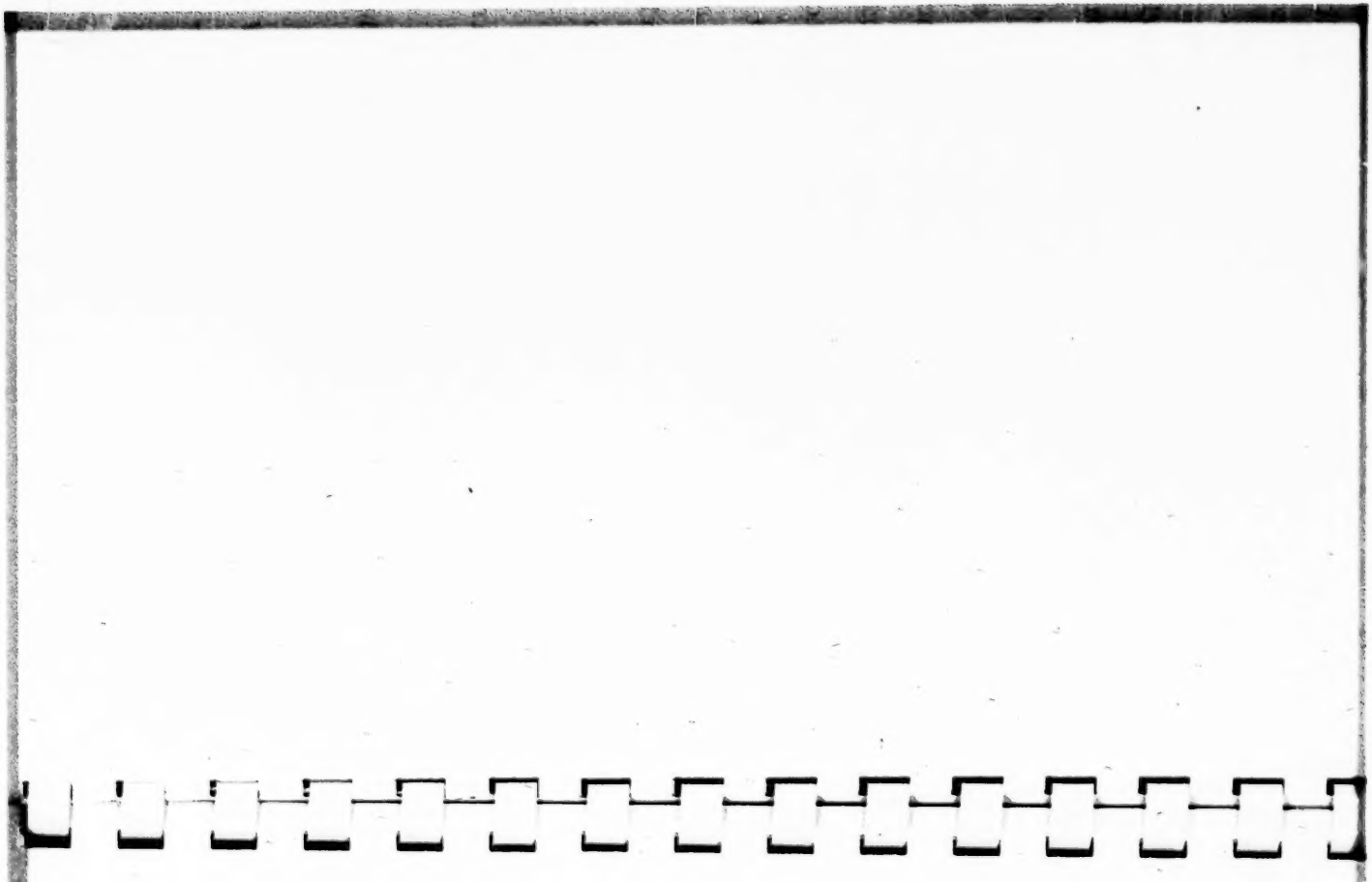
Luetkemeyer v. Kaufmann

GIBSON, Circuit Judge, dissenting.

I respectfully dissent. I do not think the State of Missouri can validly claim, in the face of the Fourteenth Amendment's Equal Protection Clause, that it has a valid purpose in promoting the separation between church and state by denying bus transportation for children to church-sponsored schools. Bus transportation is furnished as a health, safety, and welfare measure to those children residing beyond a stated area of the school, and the basis and reason for such salutary service should extend to all school children attending non-profit, accredited schools. To not do so appears narrow and insensitive of the welfare of nonpublic school attendees.

Missouri formerly furnished this service and over one-half of the states now provide transportation to nonpublic, accredited schools. The furnishing on a nondiscriminatory basis of bus transportation to all would not crumble the time-honored wall of church-state separation.

The majority holds that the laws of Missouri "can only be interpreted as permitting transportation only to public school pupils" and that such laws do not invidiously discriminate against parochial school children. In applying the traditional test of "reasonable classification," the majority concludes that "Missouri's decision to promote the separation of church and state by refusing to provide school bus transportation to church-sponsored school pupils . . . is not irrational, but pro-



motes a legitimate State purpose."

My disagreement with the majority's equal protection analysis is its conclusion that Missouri's decision to deny bus transportation for pupils to church-sponsored schools has a rational basis in fostering church-state separation. First, even the Missouri legislative policy does not clearly indicate that the history of bus transportation of school children in Missouri has been seen as establishing or aiding any particular religion. From 1939 to 1963, Missouri Revised Statutes Section 167.231 provided for bus transportation to "pupils attending private schools of elementary and high school grades, except such schools as are operated for profit." Clearly, the Missouri legislature thought for years that bus transportation for pupils

attending private and nonprofit schools did not violate the Missouri and United States Constitutions or Missouri laws. As discussed by the majority, the Supreme Court of the State of Missouri in McVey v. Harris, 258 S.W. 2d 927 (Mo. 1953), held that transportation to pupils attending private schools was prohibited by the Constitution of Missouri. However, the question remains whether furnishing bus transportation for public school children, while denying the same to church-sponsored pupils, violates the United States Constitution.

In 1947, the Supreme Court of the United States in Everson v. United States, 330 U. S. 1, 17 (1947), held that the First Amendment did not prohibit "New Jersey from spending tax-raised funds to pay the bus fares of parochial school

pupils as part of a general program under which it pays the fares of pupils attending public and other schools." The Supreme Court announced that it agreed with New Jersey that the spending of state funds for such bus transportation would not endanger the necessary wall between church and state as required by the First Amendment. It seems to be a strange anomaly also to say, as the defendants argue, that Missouri's denial of bus transportation for parochial pupils rationally promotes the separation between church and state. The two positions border being contradictory. Can New Jersey make a rational decision that bus transportation for all pupils does not endanger the separation of church and state, while Missouri takes the opposite, but supposedly also

rational decision, that the denial of bus transportation for church-sponsored school pupils does promote the separation of church and state? Admittedly, states disagree, for 27 states do provide this questioned type of bus transportation, and 23 states do not. In light of the Supreme Court's announcement in Everson and, according to the policies of 27 states, I would say that the only rational decision today is that bus transportation for children to church-sponsored schools does not endanger the separation between church and state.

The factual basis for the classification between public and private school children relating to transportation is bereft of reason, relevance, and logic. In principle, though not factual-

ly, this case is similar to Rinaldi v. United States, 384 U. S. 305 (1966), in which a New Jersey statute required unsuccessful appellants who were sentenced to jail to repay the cost of the transcript which the state had furnished. The statute did not require payment from unsuccessful appellants who were only fined or who were given probation or suspended sentences. The Court found that the purpose of the act was to reimburse the state and that the repaying of the transcript's cost by the designated class did not have any relevance to the purpose of which the classification was made. Rinaldi v. United States, supra at 309.

Similarily, in this case the parents of church-sponsored pupils are designated as a class that does not receive

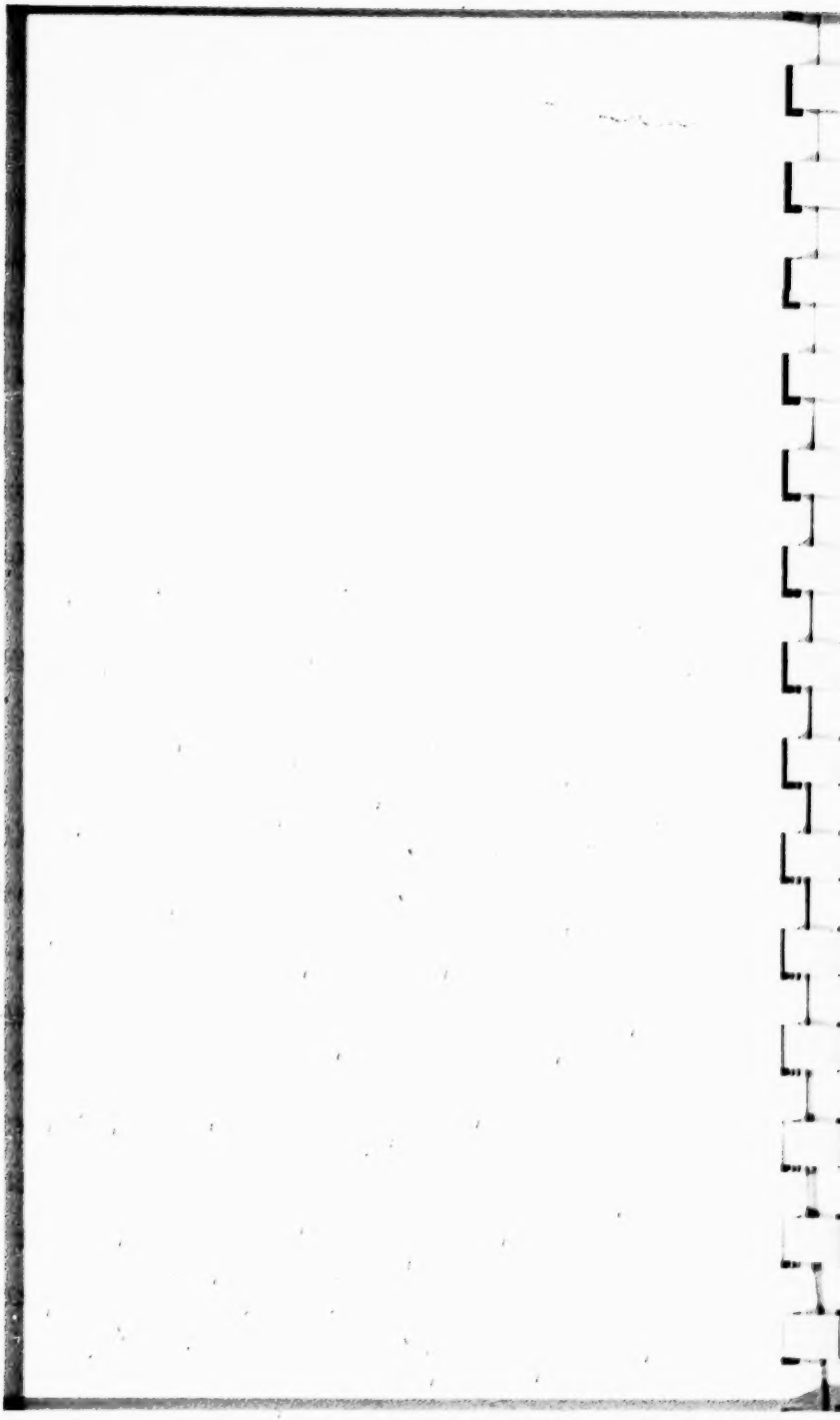
the benefits of free transportation when the paying of such bus transportation costs by the parents of these children has no relevance to promoting the separation of church and state. If Missouri wanted to be entirely neutral concerning bus transportation, it would require all parents to pay for the bus transportation for their children, rather than providing bus transportation only for public school pupils.

Several facts are particularly bothersome and serve to demonstrate the irrationality of the classification in this contested busing field. The school bus carrying pupils to public schools passed the Luetkemeyer children, proceeded past the Luetkemeyer's parochial school, and deboarded the public school children at their school. This absurd

result certainly cannot be seriously contended as promoting a "rational" purpose of separation between church and state. The children are all citizens of the same state and country. Their parents all pay the same burdensome taxes imposed on citizens generally, and yet, because of their attendance at privately accredited schools, the Luetkemeyer children walk or use private transportation while others ride at public expense.[1] The discrimination is patent, invidious, and somewhat odious. Further, bus transportation is the safest means of transporting children to school. In view of all these above facts, to which defendants stipulated, it is difficult to perceive how the State can still argue that the denial of bus transportation for children to church-

sponsored schools furthers the separation of church and state. Bus transportation is for the benefit of children, not the establishment of any particular religion or school.

The majority emphasizes the Supreme Court's recent decision of Norwood v. Harrison, 41 U. S. L.W. 5094 (U. S. June 26, 1973). The Court did say in dicta that a state could rationally conclude as a matter of legislative policy that "constitutional neutrality as to sectarian schools might be best achieved by withholding all state assistance." Norwood v. Harrison, supra at 5096 (citation omitted). However, the Court in Norwood was presented with a much different factual situation than in this case. In Norwood, the Court held that Mississippi could not lend textbooks



to school children who attended private schools that were admittedly discriminating on a racial basis. The Court noted that private schools in Mississippi had grown from 17 in 1963-64 to 155 in 1970 with a virtually all-white student enrollment. In effect, the funding of this textbook program by Mississippi was partially financing a racially discriminatory private educational system. The inapplicability of Everson and Board of Education v. Allen, 392 U. S. 236 (1968), to Norwood concerning the providing of public assistance to sectarian schools must be viewed in connection with Mississippi's program to provide textbooks to children who were attending virtually all-white private schools that had grown nine-fold at the same time that integration was beginning to be effectively

implemented in Mississippi. In the case at bar, the parents, who merely desire state-supplied bus transportation for the safety of their children, are only asserting their constitutional rights and are not attempting to further unconstitutional practices, as were the parents in Norwood. In addition, this service is for the benefit of the children, not the school.

I would hold that Missouri's denial of bus transportation for pupils to church-sponsored schools constitutes a clear violation of the Equal Protection Clause of the Fourteenth Amendment. Missouri does not have to furnish bus transportation at all, but having decided as a matter of state policy to furnish such transportation for the welfare and safety of public elementary

and high school students, that transportation should be open to all students attending accredited schools.

The Equal Protection standard of Eisenstadt v. Baird, 405 U. S. 438, 446-47 (1972), that persons standing in the same relationship to the governmental action challenged should be uniformly treated, means that children attending private schools should be afforded the same safety and welfare measures of protection in attendance as those attending public schools, no more, no less. Common justice requires it.

In giving substance and reality to the Equal Protection Clause, the Supreme Court said:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v.

> Connolly, 133 U.S. 27 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Railway Express Agency v. New York, 336 U.S. 106 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)."

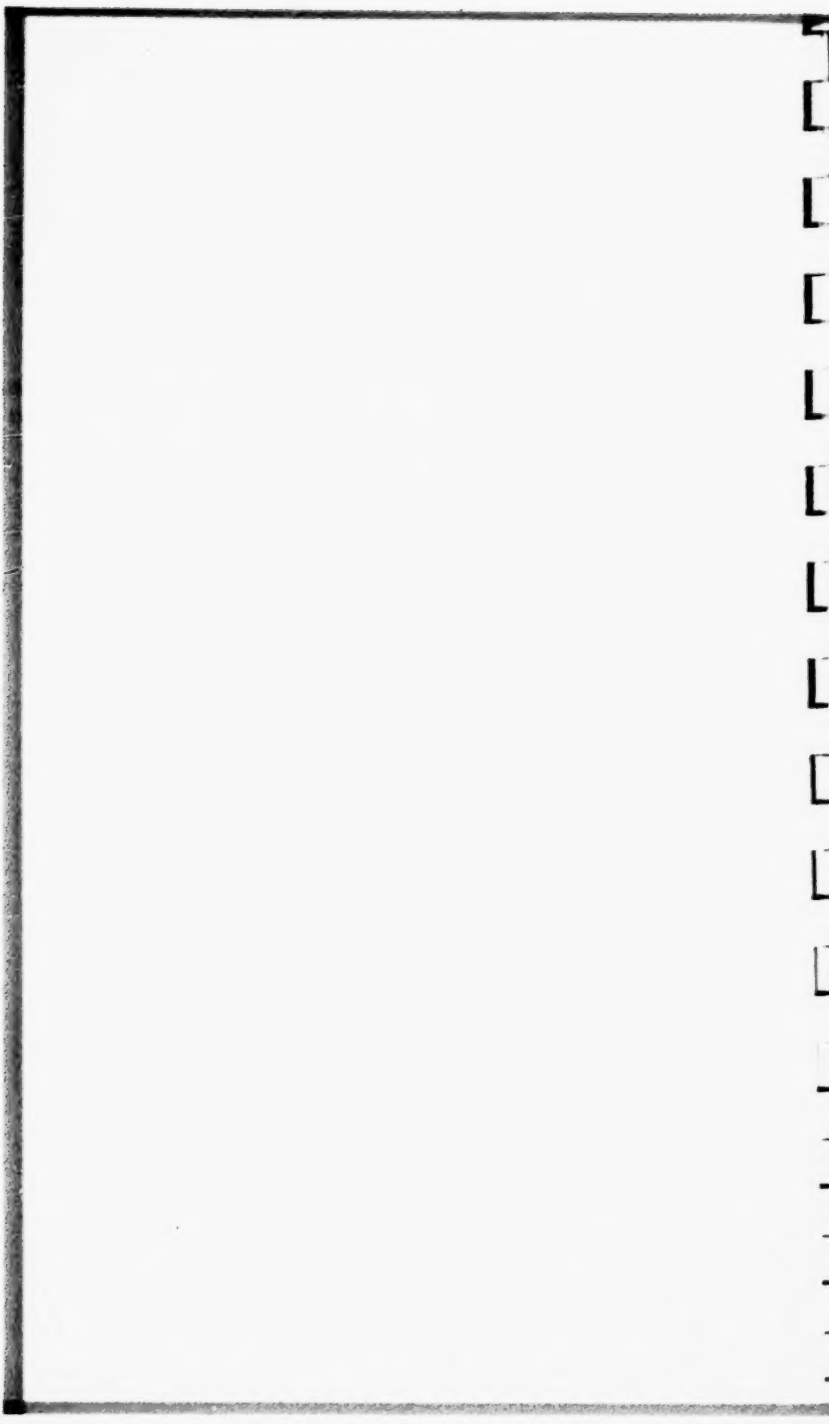
Reed v. Reed, 404 U. S. 71, 75-76 (1971).

I would hold that the Missouri statutes denying bus transportation to nonpublic school children are unconstitutional and issue an injunction against their enforcement.

FOOTNOTES

1. [page 60]

The parties stipulated that bus transportation for nonpublic school children would be less than .46 per cent of Missouri's total annual expenditure for public elementary and secondary education.



IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

URBAN B. LUETKEMEYER, et al.,
Plaintiffs,

vs. No. 1703

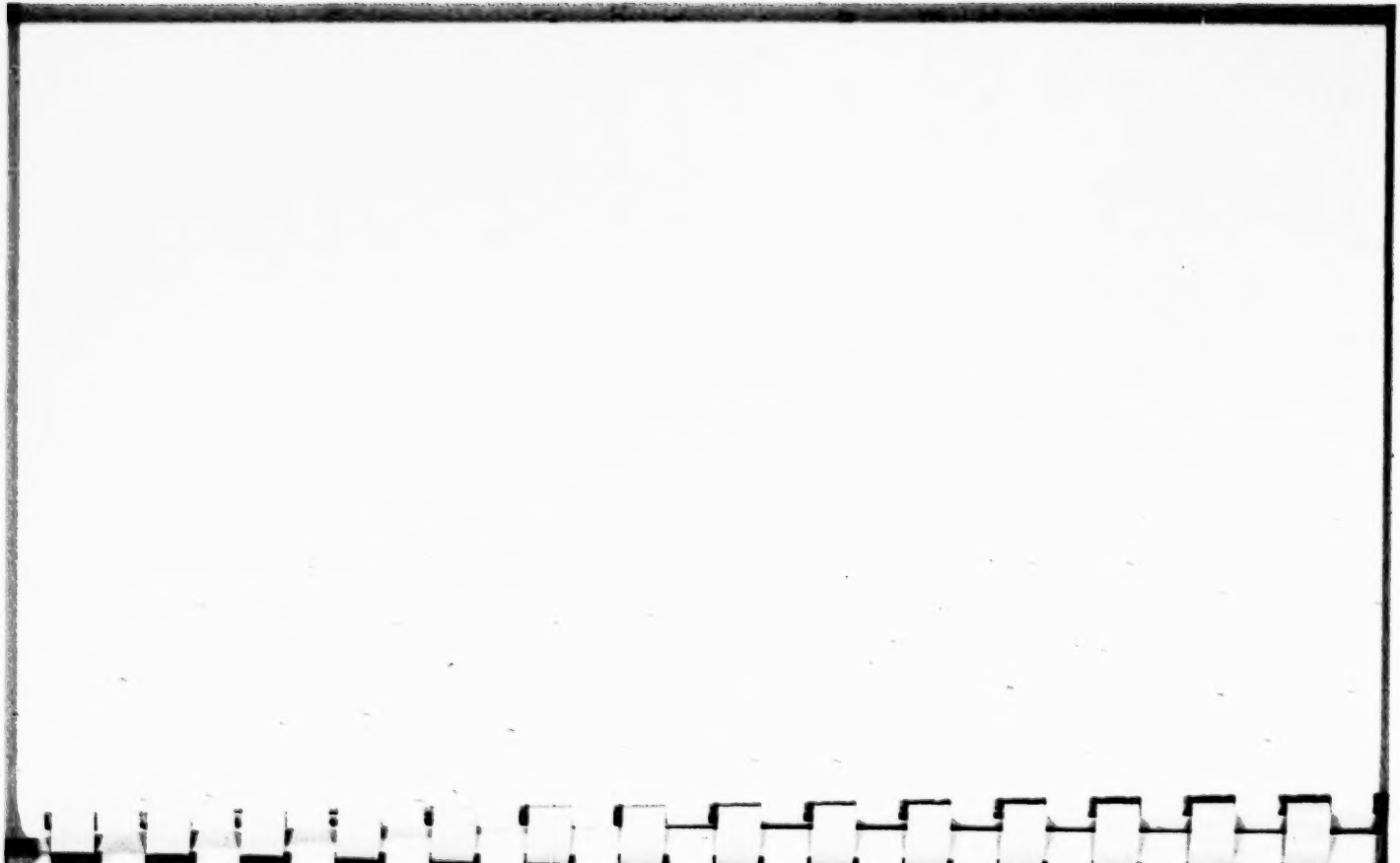
HAROLD KAUFMANN, et al.,
Defendants.

MEMORANDUM AND ORDER

This case pends on plaintiffs' motion for a new trial. We have fully considered that motion, the response of defendants, and the briefs in support, and find and conclude that the motion should be denied.

Accordingly, it is

ORDERED that the plaintiffs' motion for a new trial should be and the same is hereby denied.



/s/ Floyd R. Gibson
Floyd R. Gibson, Circuit Judge

/s/ John W. Oliver
John W. Oliver, District Judge

/s/ William R. Collinson
William R. Collinson, District Judge

Kansas City, Missouri

October 30, 1973

IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

URBAN B. LUETKEMEYER
AND
KENNAN L. LUETKEMEYER AND
JACQUELINE LUETKEMEYER, BY
NEXT FRIEND URBAN B. LUETKEMEYER,

Plaintiffs,

VS. No. 1703

HAROLD KAUFMANN, MARGARET HIGGINS, JAMES STARK, ROBERT BEMBOOM, CLETUS HIRSCHVOGEL, AND JOHN LUECKENOTTE, being members of the board of directors of R-III Cole County School District;

F. BURTON SAWYER, E. J. MELTON, JACK WEBSTER, SIDNEY R. REDMOND, DALE M. THOMPSON, W. C. BANTA, HARVEY B. YOUNG, JR., MRS. ELEANOR B. GRIFFITH, being members of the state board of education of the State of Missouri,

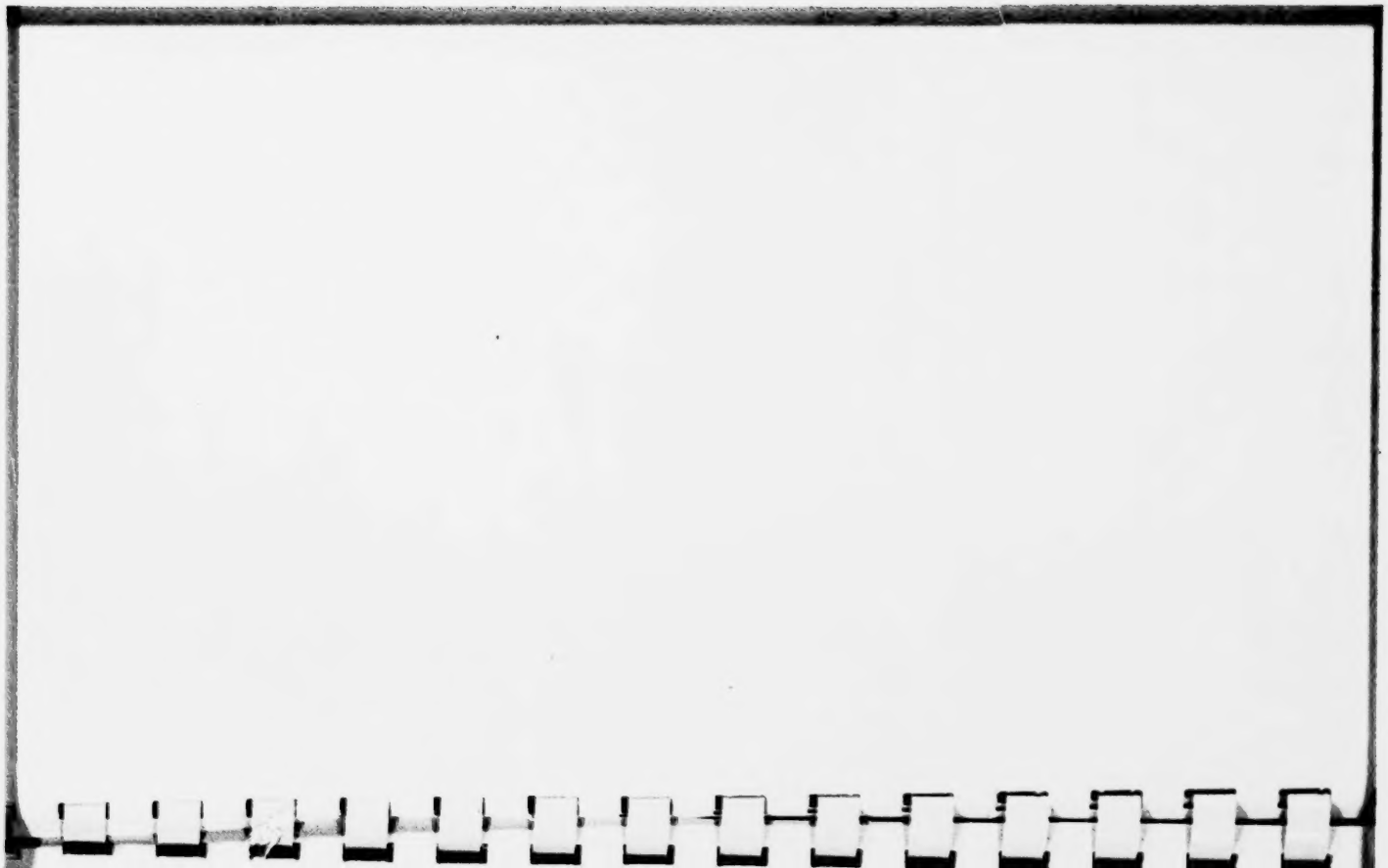
and ARTHUR L. MALLORY, Commissioner of Education of the State of Missouri,

Defendants.

NOTICE OF APPEAL

TO THE SUPREME COURT

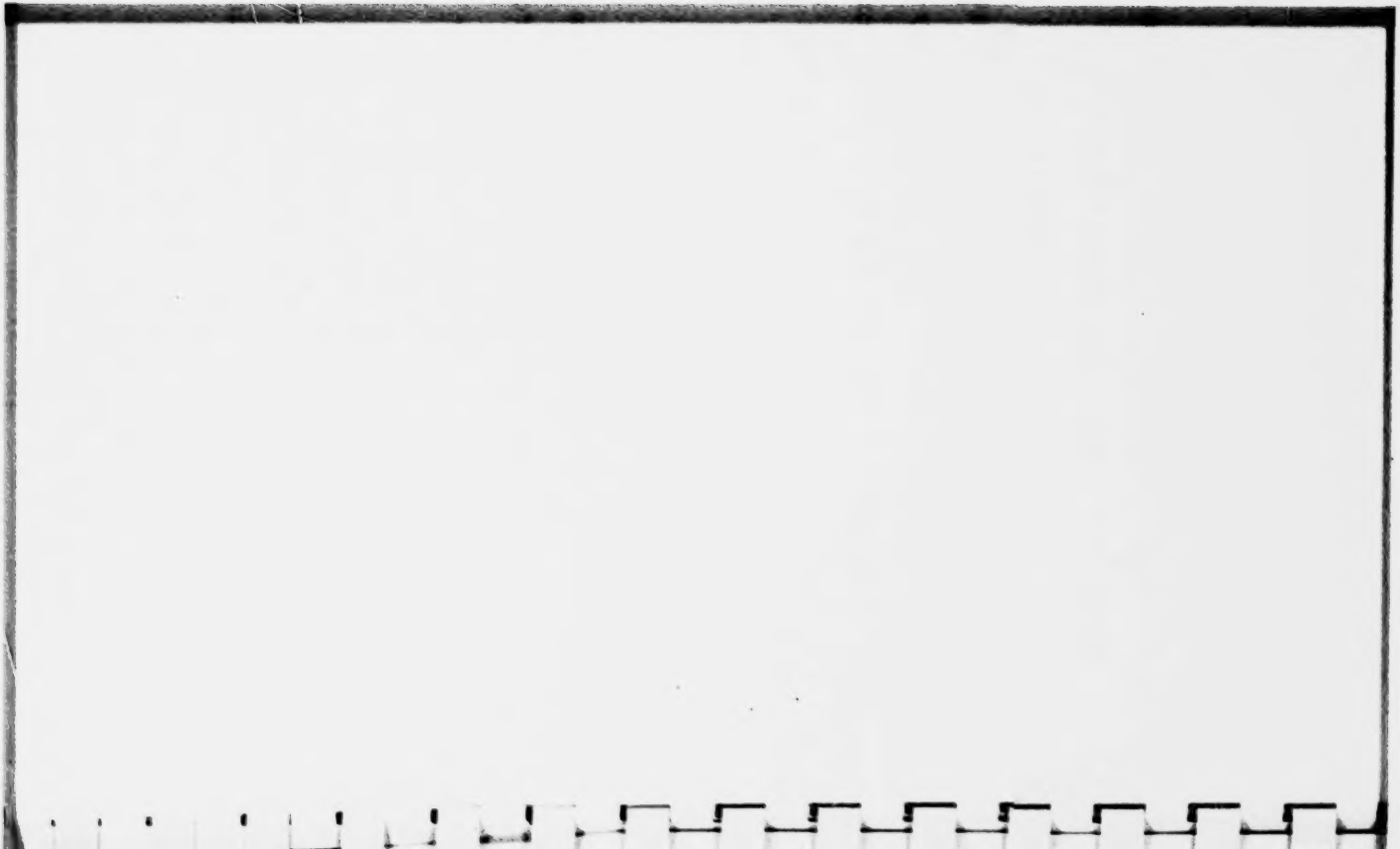
OF THE UNITED STATES



I. Notice is hereby given that Urban B. Luetkemeyer, Kennan L. Luetkemeyer and Jacqueline Luetkemeyer, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order and judgment denying to plaintiffs the relief prayed for in their complaint, entitled Findings of Fact, Conclusion of Law, and Final Judgment Denying Relief Prayed For by Plaintiffs, entered in this action on September 24, 1973, and the Memorandum and Order denying plaintiffs' Motion for New Trial entered on October 30, 1973.

This appeal is taken pursuant to Title 28 U. S. C. Section 1253.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the clerk of the Supreme Court of the United States.



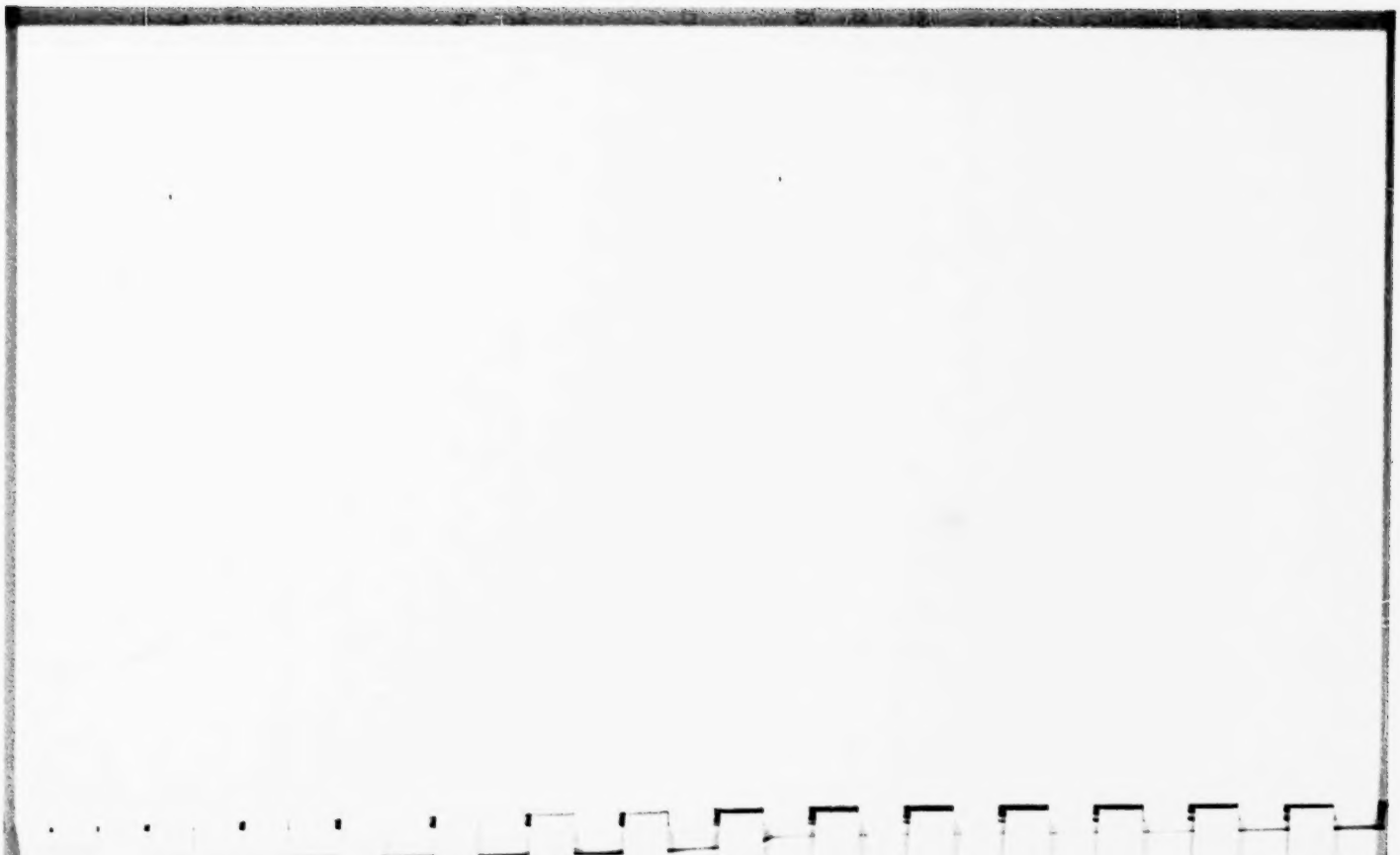
III. The following questions are presented by this appeal;

1.

Do the statutes of the State of Missouri which provide for the transportation at public expense of children to and from home and school constitute public welfare legislation that provides a public benefit which must be available to all persons on a nondiscriminatory basis?

2.

Does the transportation of children at public expense to and from home and school have as its purpose and effect the protection of the health, safety and welfare of children going to and coming from school, and does said transportation serve the further purpose of enabling and assisting parents and



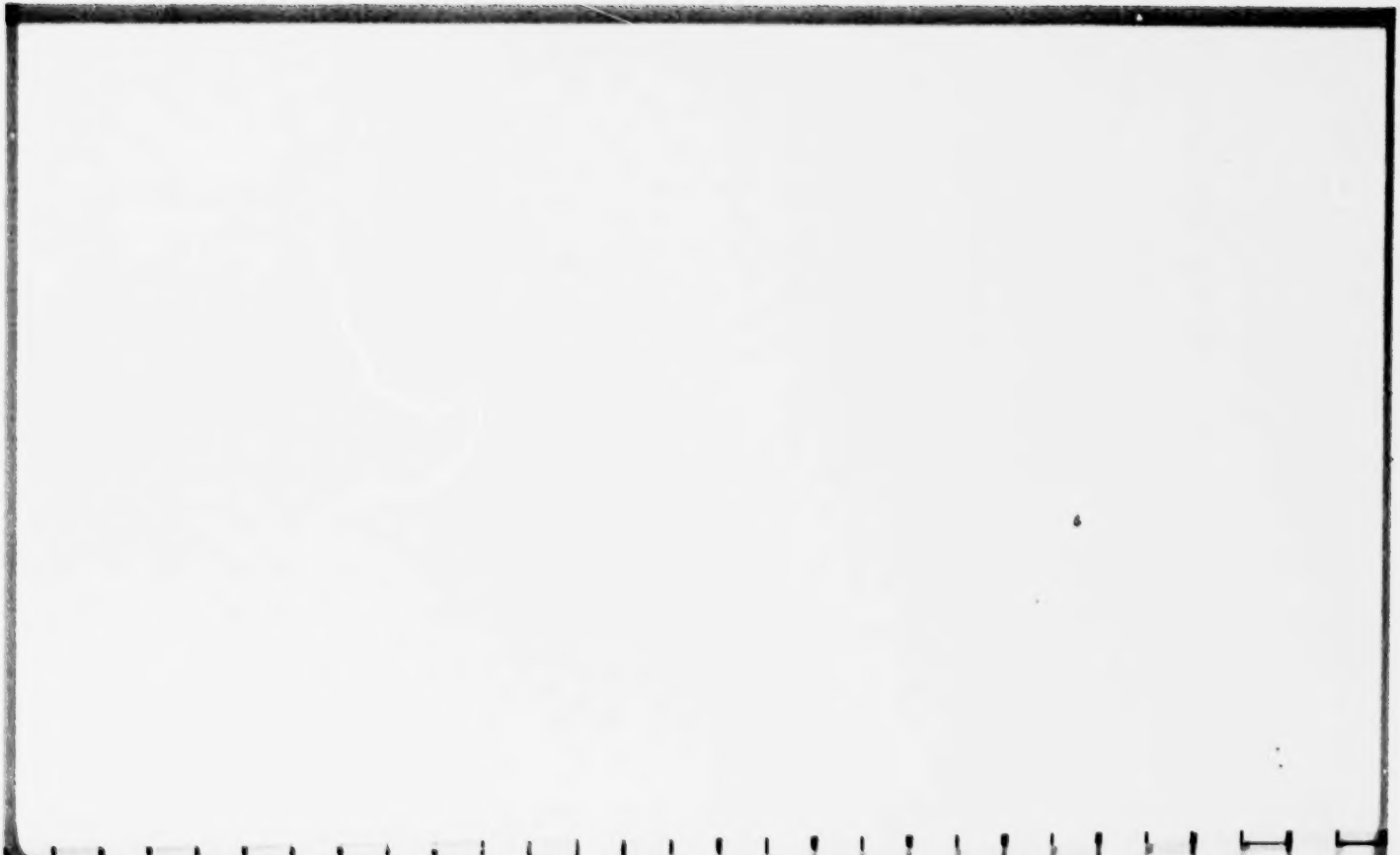
children in complying with the compulsory school attendance law?

3.

Is the transportation at public expense of children going to and from school a public service and facility which cannot be refused, withheld, or denied to any person by reason of race, creed, color, religion, national origin, or ancestry?

4.

Does the refusal of defendants to permit plaintiffs to use the school bus facilities, operated by defendants at public expense, for the purpose of going to and from plaintiffs' home and a non-public school cause plaintiffs to be subjected by defendants under color of statutes, regulation, custom, or usage of the State of Missouri, to deprivation



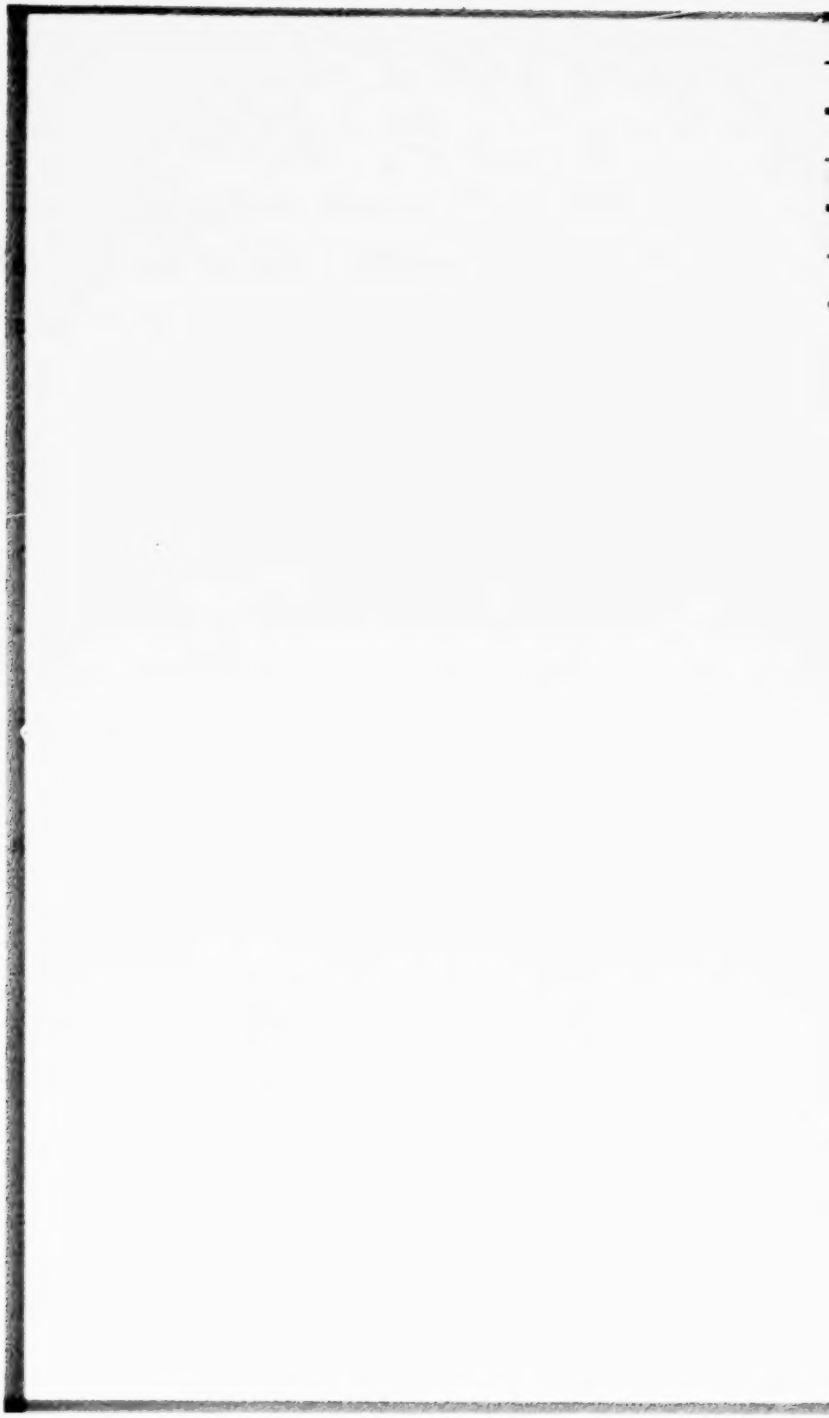
of rights, privileges or immunities secured by the Constitution of the United States as contemplated by Title 42 U. S. C. 1983?

5.

Does the refusal of defendants to allow plaintiffs to avail themselves of the public benefit and the public services and facilities of the school bus transportation operated and maintained by defendants at public expense, in going to and from plaintiffs' home and a non-public school, constitute invidious discrimination against plaintiffs and deny to plaintiffs the equal protection of the laws as guaranteed to plaintiffs by the 14th Amendment to the United States Constitution?

6.

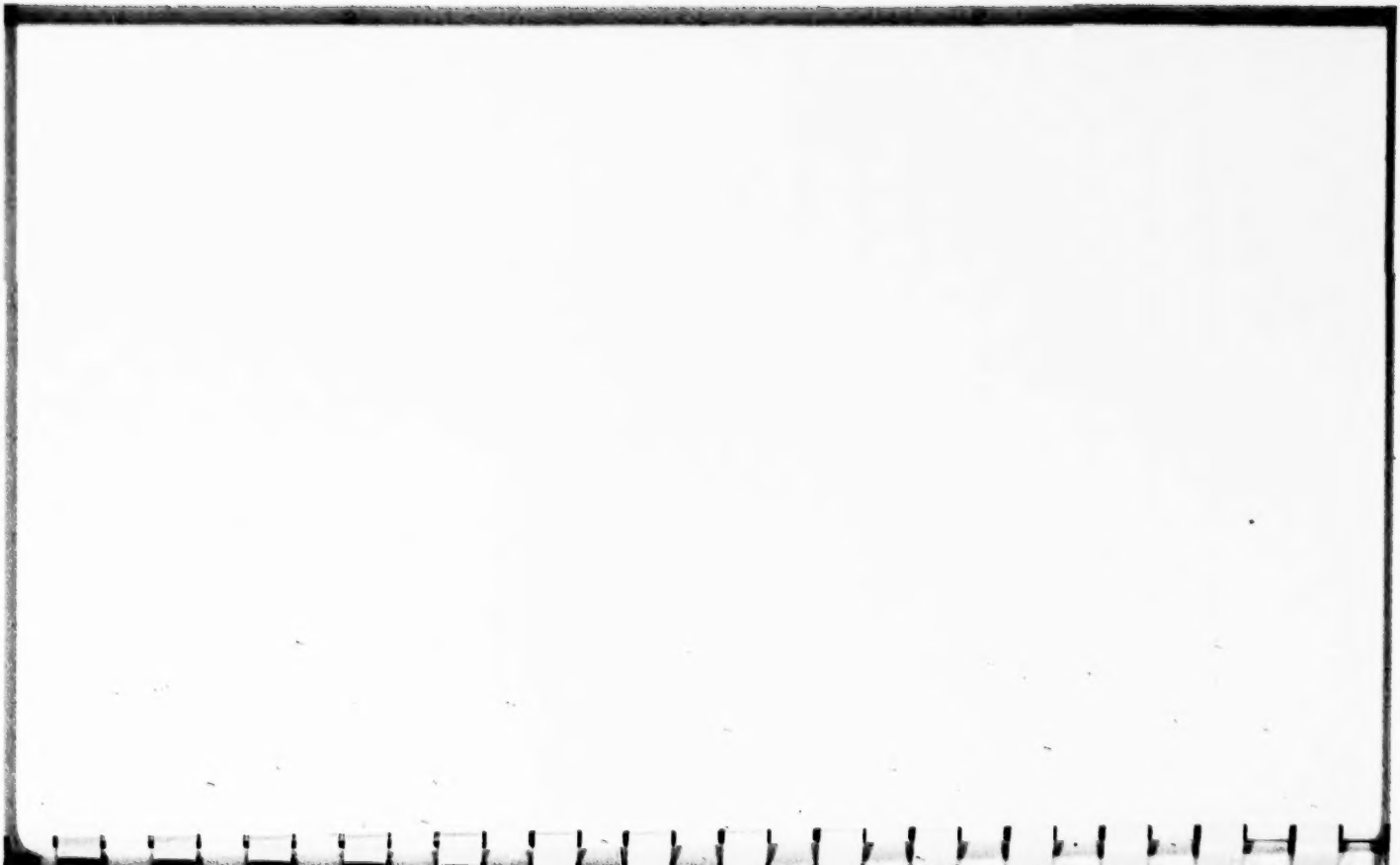
Do the statutes of the State of



Missouri which provide transportation to children attending public schools and which deny said transportation to children attending non-public schools constitute laws made and enforced by the State of Missouri which abridge the privileges or immunities of plaintiffs to enjoy the school bus transportation provided for therein on an equal basis with all other citizens of the State of Missouri as guaranteed to plaintiffs by the 14th Amendment to the United States Constitution?

7.

Do the statutes of the State of Missouri which provide transportation to and from school to children attending public schools and which deny said transportation to children attending non-public schools interfere with plain-



tiff Urban B. Luetkemeyer in the exercise of his fundamental right to direct the upbringing and education of his children?

8.

Does the denial to plaintiffs by defendants of school bus transportation to and from plaintiffs' home and school for the reason that said school is a non-public school operated by a church impose a burden on the free exercise of plaintiffs' religion in contravention of the 1st and 14th Amendments to the Constitution of the United States?

9.

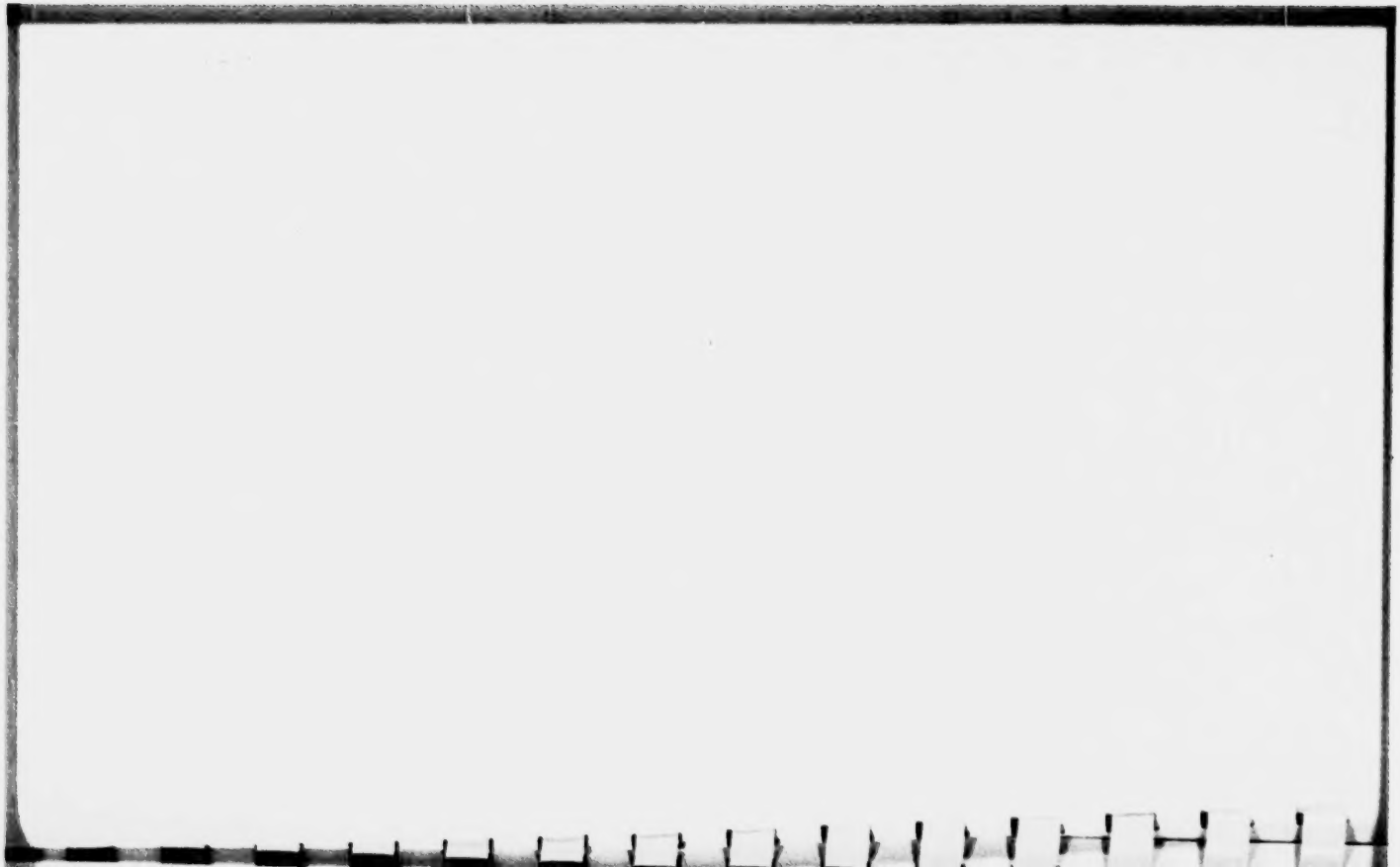
Does the levy and collection of taxes by Cole County Missouri and the State of Missouri against plaintiff Urban B. Luetkemeyer, for the purpose of establishing and maintaining school bus

transportation, and the denial to plaintiff the use of said transportation for the health, safety and welfare of his children in going to and from school, take his property for a public benefit while denying to him the enjoyment of said benefit on an equal basis with all other citizens of the State of Missouri, constitute the arbitrary taking of his property without compensation and deprive him of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States?

/s/ Thomas J. Downey
Thomas J. Downey
701-2 Central Trust Building
Jefferson City, Missouri 65101
Attorney for Plaintiffs

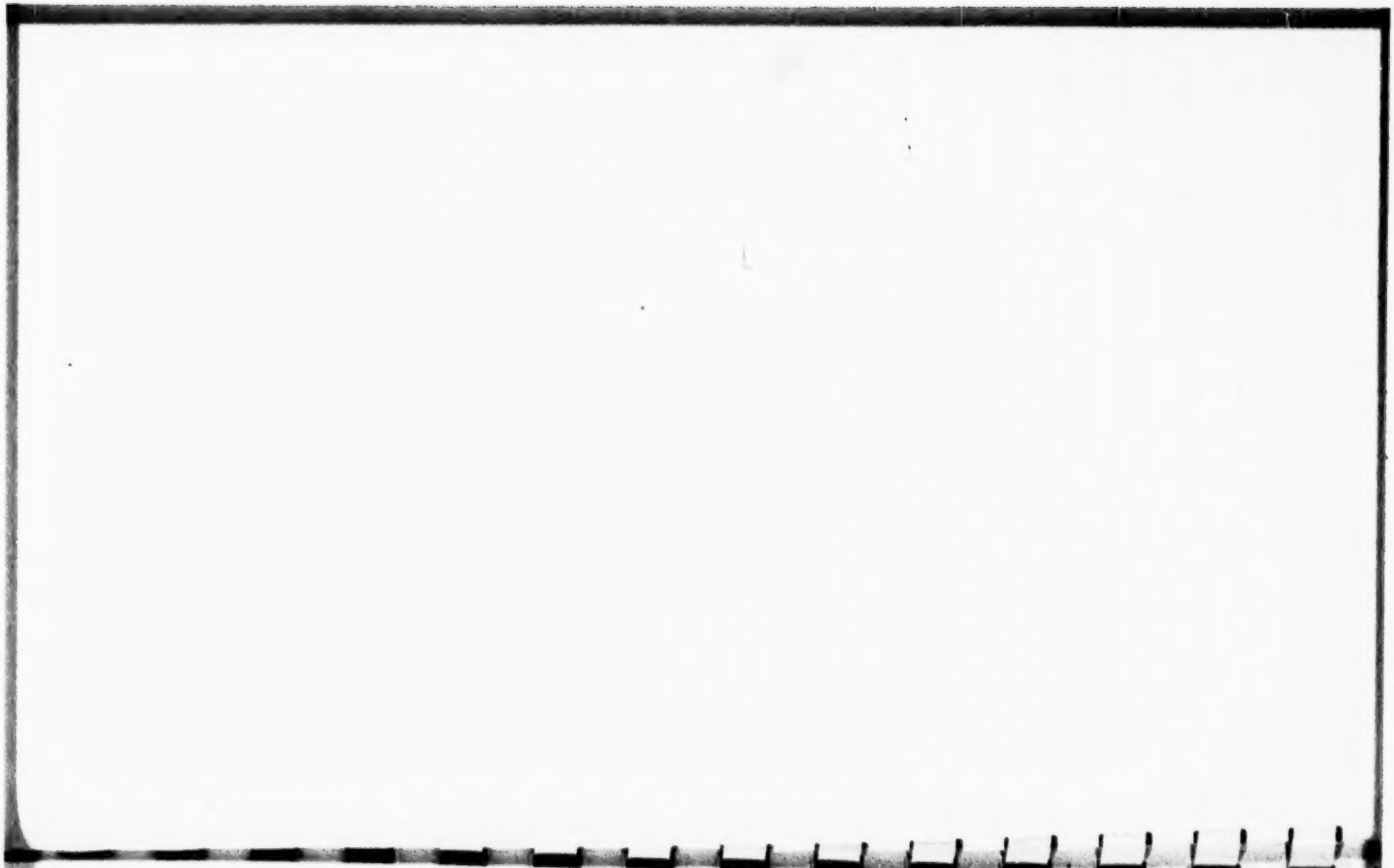
PROOF OF SERVICE

I, Thomas J. Downey, Attorney for Urban B. Luetkemeyer, Kennan L. Luetkemeyer and Jacquelin Luetkemeyer, Appellants herein, and a member of the Bar of the Supreme Court of the United States hereby certify that I served copies of the foregoing Notice of Appeal To The Supreme Court Of The United States by mailing copies on December 28, 1973, in duly addressed envelopes with first class postage prepaid to John W. Inglish, 211 East Capitol Street, Jefferson City, Missouri 65101, Attorney for defendants Harold Kaufmann, Margaret Higgins, James Stark, Robert Bemboom, Cletus Hirschvogel, and John Lueckenotte, being members of the board of directors of R-III Cole County School District; and to the Honorable John C. Danforth, Attorney



General, Supreme Court Building, Jefferson City, Missouri 65101, Attorney for defendants F. Burton Sawyer, E. J. Melton, Jack Webster, Sidney R. Redmond, Dale M. Thompson, W. C. Banta, Harvey B. Young, Jr., Mrs. Eleanor B. Griffith, being members of the state board of education of the State of Missouri, and Arthur L. Mallory, Commissioner of Education of the State of Missouri.

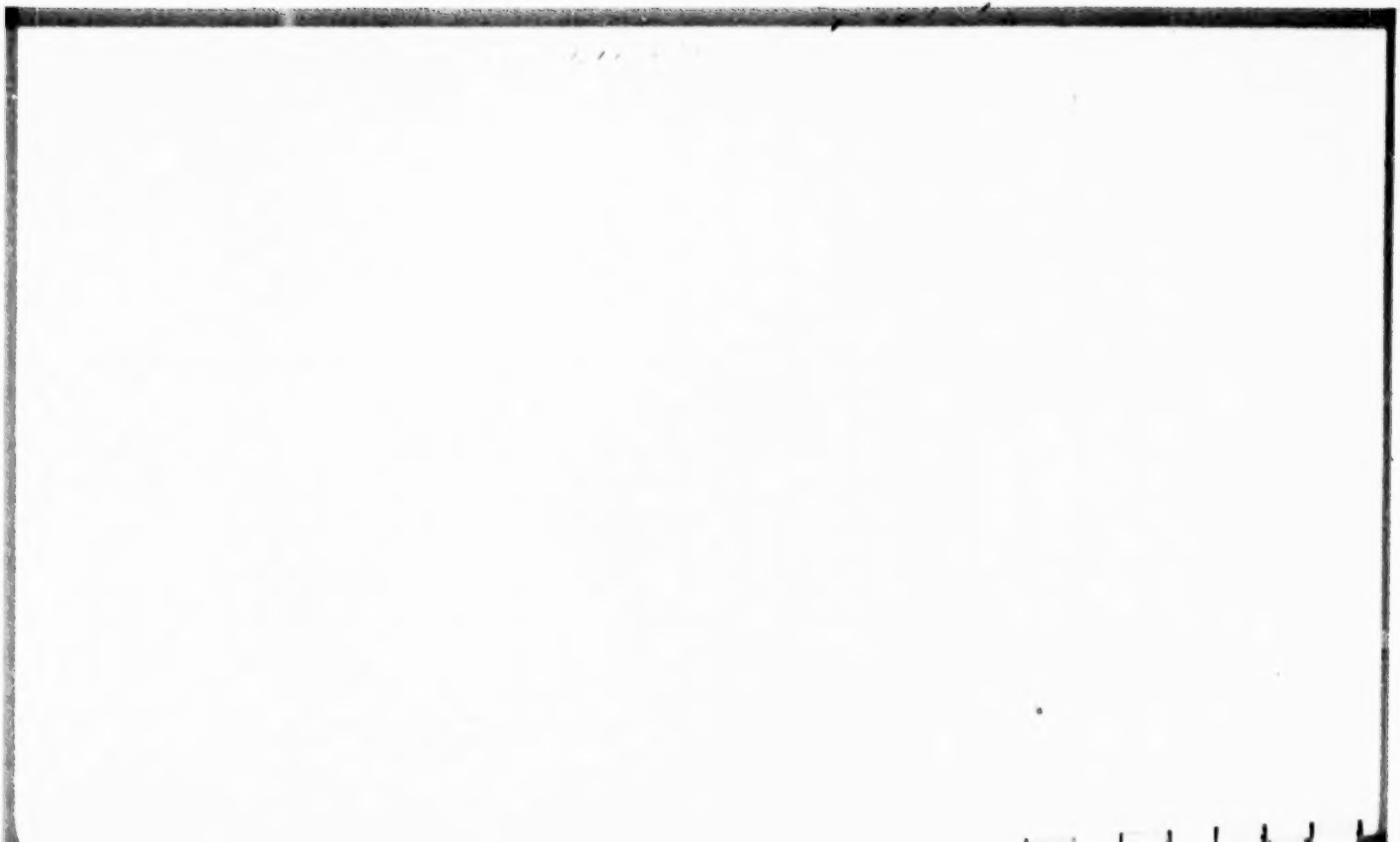
/s/ Thomas J. Downey
Thomas J. Downey
701-2 Central Trust Building
Jefferson City, Missouri 65101
Attorney for Appellants



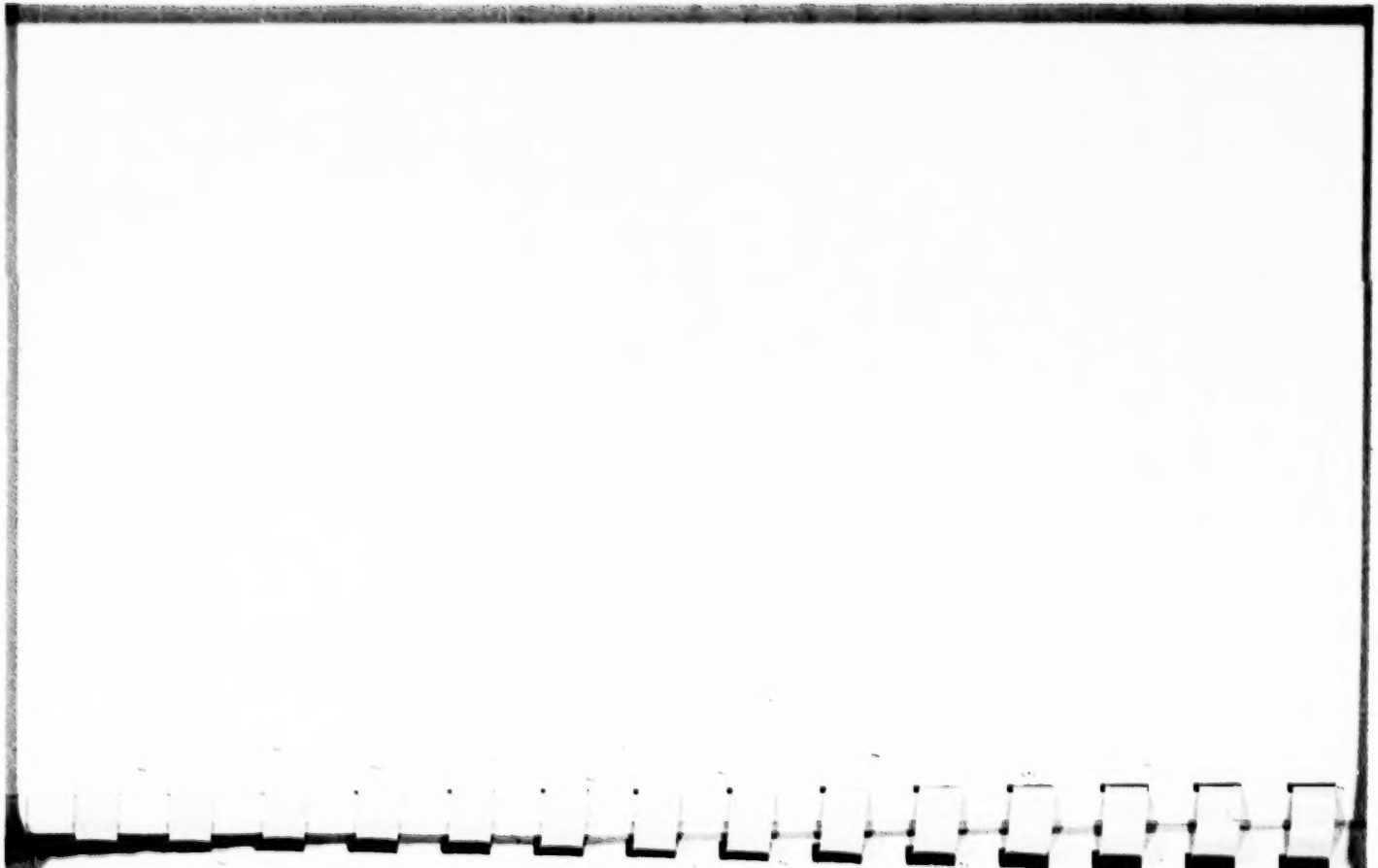
Appendix V - Text of Statutes

167.231. Transportation of pupils within all except metropolitan districts. ---Within all school districts except metropolitan districts the school board shall provide transportation to and from school for all pupils living more than three and one-half miles from school and may provide transportation for all pupils living one mile or more from school. When the school board deems it advisable, or when requested by a petition signed by ten taxpayers in the district, to provide transportation to and from school at the expense of the district for pupils living more than one-half mile from school, the board shall submit the question at an annual or biennial meeting or election or a special meeting or election called for the purpose. Notice

of the meeting or election shall be given as provided in section 162.061, RSMo. If two-thirds of the voters, who are taxpayers, voting at the election or meeting, are in favor of providing the transportation the board shall arrange and provide therefor.



167.251. Board to prescribe rules and regulations -- driver to give bond -- fund charged with transportation expenses. ---When transportation is provided by a district pursuant to law, the school board shall make all needful rules and regulations for the transportation of pupils and shall require from every person employed for that purpose, a reasonable bond conditioned upon the faithful discharge of his duties as prescribed by the board. Expenses of transportation shall be paid out of the incidental fund of the district.



163.161. State aid for transportation of pupils. --- 1. Any school district which makes provision for transporting pupils as provided in sections 167.231 and 167.241, RSMo, shall receive state aid for the ensuing year for such transportation on the basis of the number of public school pupils transported per mile traveled as follows:

Pupils transported per mile traveled	Allowance per pupil per month
0 to 2.9	$8.00
3.0 to 3.9	5.00
4.00 or more	4.00

The number of pupils transported per mile traveled is determined by dividing the average daily number of pupils transported one mile or more by the total miles of approved bus routes. The amount of state aid is determined by multiplying the allowance per pupile per month by the average daily number of

pupils transported and multiplying the sum thus derived by the number of months the pupils are transported. Both resident and nonresident pupils shall be counted alike in determining the pupils transported per mile traveled. In no event shall such state aid per pupil exceed actual cost per pupil.

2. The state board of education shall approve all bus routes and determine the total miles each district should have for the effective and economical transportation of the pupils.

163.061. Allocation of state aid to district funds. ---Not less than eighty percent of the state school moneys received under the provisions of subsections 1, 2 and 3 of section 163.031 shall be placed in the teachers' fund and the remaining percent of such moneys in the incidental fund.

165.011. District funds -- allocation of moneys -- transfers -- tuition paid from what funds. --- 1. The following funds are created for the accounting of all school moneys: Teachers' fund, incidental fund, free textbook fund, building fund, and debt service fund. The treasurer of the county, township or school district shall open an account for each fund specified in this section, and all moneys received from the county school fund, all moneys derived from taxation for teachers' wages, all tuition fees, and not less than eighty percent of the state moneys received under subsections 1, 2 and 3 of section 163.031, RSMo, and all other moneys received from the state except as herein provided, shall be placed to the credit of the teachers'

fund. The remainder of the state moneys received under subsections 1, 2 and 3 of section 163.031, RSMo, money apportioned by the state and received from other districts for transportation, and money derived from taxation for incidental expenses shall be credited to the incidental fund. Money apportioned for free textbooks shall be credited to the free textbook fund. All money derived from taxation or received from the state for the erection of buildings or additions thereto and the remodeling or reconstruction of buildings and the furnishing thereof for the purchase of real estate, or from sale of real estate, schoolhouses or other buildings of any kind, or school furniture, from insurance, from sale of bonds other than refunding bonds shall be placed to the

credit of the building fund. Money derived from taxation for the retirement of bonds and the payment of interest thereon shall be credited to the debt service fund. Receipts from delinquent taxes shall be allocated to the several funds on the same basis as receipts from current taxes, except that where the previous years' obligations of the district would be affected by such distribution, the delinquent taxes shall be distributed according to the tax levies made for the years in which the obligations were incurred. All refunds received shall be placed to the credit of the fund from which the original expenditures were made. Money donated to the school districts shall be placed to the credit of the fund where it can be expended to meet the purpose for which it

was donated and accepted. Money received from any other source whatsoever shall be placed to the credit of the fund or funds designated by the board.

2. The school board may transfer from the incidental to the building fund the sum that is necessary for the ordinary repairs of school property. If a balance remains in the free textbook fund after books are furnished to pupils as provided in section 170.051, RSMo, it shall be transferred to the teachers' fund. After all incidental obligations are paid, the board may transfer the portion of the balance remaining in the incidental fund to the teachers' fund that is necessary for the total payment of all contracted obligations to teachers. If a balance remains in the debt service fund, after the total out-

standing indebtedness for which the fund was levied is paid, the board may transfer the unexpended balance to the building fund. On July 1, 1965, the interest fund and sinking fund shall be combined and become the debt service fund.

3. Tuition shall be paid from either the teachers' or incidental funds. When the school in any district has been closed on account of temporary combination or low average daily attendance, as provided by law, tuition and transportation costs shall be paid from either the teachers' or incidental funds.

In the Supreme Court of the United States

OCTOBER TERM, 1973

FILED
JUN 8 1974
MICHAEL RODAK, JR., CLERK

No. 73-1612

URBAN B. LUETKEMEYER and KENNAN L. LUETKEMEYER and JACQUELINE LUETKEMEYER, by Next Friend URBAN B. LUETKEMEYER,
Appellants,

vs.

HAROLD KAUFMANN, MARGARET HIGGINS, JAMES STARK, ROBERT BEMBOOM, CLETUS HIRSCHVOGEL, and JOHN LUECKENOTTE, Being Members of the Board of Directors of R-III Cole County School District; F. BURTON SAWYER, E. J. MELTON, JACK WEBSTER, SIDNEY R. REDMOND, DALE M. THOMPSON, W. C. BANTA, HARVEY B. YOUNG, JR., MRS. ELEANOR B. GRIFFITH, Being Members of the State Board of Education of the State of Missouri, and ARTHUR L. MALLORY, Commissioner of Education of the State of Missouri,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION

MOTION TO AFFIRM

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TABLE OF CONTENTS

Opinion Below 2

Jurisdiction 2

Question Presented 2

Statutes Involved 2

Statement of the Case 3

Argument 5

Table of Authorities

CASES

Berghorn v. *Reorganized School District No. 8*, 364 Mo. 121, 260 S.W.2d 573 (1953) 5

Brusca v. *State of Missouri ex rel. State Board of Education*, 332 F.Supp. 275 (E.D. Mo. 1971), aff'd 405 U.S. 1050 (1972) 7

DiCenso v. *Robinson*, 316 F.Supp. 112 (D. R.I. 1970), aff'd 403 U.S. 602 (1972) 8

Harfst v. *Hoegen*, 394 Mo. 808, 163 S.W.2d 609 (Banc 1942) 5

Luetkemeyer v. *Kaufmann*, 364 F.Supp. 376 (W.D. Mo. 1973) 2, 5

McVey v. *Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (Banc 1953) 4, 5, 6

Norwood v. *Harrison*, 413 U.S. 455 (1973) 7, 8

Walz v. *Tax Commission*, 397 U.S. 664 (1970) 8

Constitutional Provisions and Statutes

Article I, Section 7, Constitution of Missouri (1945) 5

Article IX, Constitution of Missouri (1945)—

Section 3 ..... 4, 6

Section 5 ..... 4, 6

Section 8 5

Constitution of the United States—

First Amendment 6, 8

Fourteenth Amendment 6

RSMo 1969—

Section 162.621 ..... 2, 6

Section 163.161 6

Section 167.231 6

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1612

URBAN B. LUETKEMEYER and KENNAN L. LUETKEMEYER and JACQUELINE LUETKEMEYER, by Next Friend URBAN B. LUETKEMEYER,

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HAROLD KAUFMANN, MARGARET HIGGINS, JAMES STARK, ROBERT BEMBOOM, CLETUS HIRSCHVOGEL, and JOHN LUECKENOTTE, Being Members of the Board of Directors of R-III Cole County School District; F. BURTON SAWYER, E. J. MELTON, JACK WEBSTER, SIDNEY R. REDMOND, DALE M. THOMPSON, W. C. BANTA, HARVEY B. YOUNG, JR., MRS. ELEANOR B. GRIFFITH, Being Members of the State Board of Education of the State of Missouri, and ARTHUR L. MALLORY, Commissioner of Education of the State of Missouri,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION

MOTION TO AFFIRM

Appellees move to affirm the judgment of the United States District Court for the Western District of Missouri

because the questions presented are so unsubstantial as not to need further argument and because the decision below is so obviously correct as to warrant no further review.

OPINION BELOW

The opinion of the United States District Court for the Western District of Missouri (Appendix I to Jurisdictional Statement) is reported at 364 F.Supp. 376 (W.D. Mo. 1973).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED

Appellants list nine questions which they suggest are presented by this appeal. Appellees believe only one question is presented by this appeal.

> Does the Constitution of the United States require the State of Missouri to provide bus transportation to children attending church-related schools if Missouri provides bus transportation to some children attending public schools?

STATUTES INVOLVED

In addition to the Missouri statutes governing pupil transportation which are set forth in Appendix V to the Jurisdictional Statement, Section 162.621, RSMo 1969, per-

taining only to school districts in cities not within a county, i.e. School District of the City of St. Louis, provides as follows:

> "The board of education shall have general and supervising control, government and management of the public schools and public school property of the district in the city and shall exercise generally all powers in the administration of the public school system therein. The board of education has all the powers of other school districts under the laws of this state except as herein provided and shall perform all duties required by general laws of school districts so far as they are applicable to the public school affairs of the city and are consistent with this law. It shall appoint the officers, agents and employees it deems necessary and proper and fix their compensation. The board of education may:
>
> * * *
>
> (8) Provide for the gratuitous transportation of pupils to and from schools in cases where by reason of special circumstances pupils are required to attend schools at unusual distances from their residences.

STATEMENT OF THE CASE

Appellants, in their Statement of the Case, emphasize the evidence which they contend suggests that pupil transportation is a public welfare measure. In so doing, appellants completely ignore the evidence introduced by the defendants that pupil transportation in Missouri is an educational service constituting a direct benefit to the institution to which the pupils are transported. The testimony of witnesses Summers and Haynes and numerous excerpts

from Annual Reports of the Public Schools of the State of Missouri, published by the Missouri State Department of Education for the years 1902 through 1970, support the conclusion that the primary impetus behind the development of pupil transportation in Missouri was the desire to improve the educational opportunities available to rural school children. The legislative and administrative emphasis on school bus safety was a *result* of the rapid growth of pupil transportation and not the purpose for its development. See Stipulation of Facts No. 2, paragraphs 46, 50-51 and 52-53, and Exhibits S through OOO.

Appellants also ignore the Missouri Supreme Court decision in *McVey* v. *Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (Banc 1953). In this decision, the Missouri Supreme Court ruled unconstitutional a statute which authorized the use of public funds to transport children to private schools. Under the Missouri Constitution of 1945 (Article IX, Sections 3 and 5) public funds for education can be lawfully expended only for "establishing and maintaining free public schools. . . ." The Court concluded that the expenditure of public funds for pupil transportation to public schools is an expenditure for "establishing and maintaining free public schools. . . ." However, an expenditure for transportation to private schools would not be an expenditure for "establishing and maintaining free public schools. . . ." If the expenditure of money to transport students to public schools assists in the establishment and maintenance of public schools, by strong inference from *McVey* such an expenditure for transportation to church-related schools would assist in "establishing and maintaining" sectarian schools. Therefore, pupil transportation in Missouri cannot be claimed to be a public welfare meaure solely benefiting children as claimed by appellants.

ARGUMENT

The decision of the District Court is plainly correct. The questions raised by appellants in the Jurisdictional Statement concerning the validity of Missouri's refusal to provide pupil transportation to and from church-related schools are so insubstantial as not to warrant further argument.

"Missouri has a long history of maintaining a very high wall between church and state." *Luetkemeyer* v. *Kaufmann*, 364 F.Supp. 376, 383 (W.D. Mo. 1973). Absolute separation of church and state is expressed by several sections of the 1945 Missouri Constitution. See, for instance, Article I, Section 7, which states in part that ". . . no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination or religion, or in aid of any priest, preacher, minister or teacher thereof, as such; . . ." and Article IX, Section 8, which states in part that "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything . . . to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; . . ."

The Missouri Supreme Court has recognized and enforced this constitutional policy on several occasions. *Harfst* v. *Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (Banc 1942); *Berghorn* v. *Reorganized School District No. 8*, 364 Mo. 121, 260 S.W.2d 573 (1953); and *McVey* v. *Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (Banc 1953). In *Harfst*, as noted by the District Court, the Missouri Supreme Court described the Missouri Constitution as going "farther than those of some other

states" in prohibiting public assistance to religion. 163 S.W.2d at 613.

In *McVey* v. *Hawkins, supra*, the Missouri Supreme Court ruled unconstitutional a statute which authorized transportation at public expense of children attending church-related schools. The statute was held violative of Sections 3 and 5 of Article IX, Missouri Constitution of 1945, which require that public school moneys of the State of Missouri can be used only in "establishing and maintaining free public schools and for no other use or purpose whatsoever." Article IX, Section 5.

The statutory provision which was declared unconstitutional by the Court in *McVey* was deleted in 1963 and, therefore, the current statutes authorizing transportation at public expense—Sections 167.231, 163.161 and 162.621, RSMo—must be interpreted as authorizing only transportation of students attending public schools. Therefore, the wall between church and state in Missouri prohibits pupil transportation to church-related schools at public expense for the reason that such transportation constitutes support of schools other than free public schools.

Appellants argue that nine substantial questions are raised by Missouri's refusal to transport children to sectarian schools. Underlying these questions are two major arguments: (1) that an alleged unlawful classification results from Missouri's refusal to transport children to church-related schools (sometimes claimed to be a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and sometimes claimed to be a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States) and (2) that the Free Exercise Clause of the First Amendment to the Constitution of the United States has been infringed.

Appellants argue that Missouri may not rationally conclude that neutrality as to sectarian schools can best be achieved by withholding all state assistance including transportation of pupils to and from such religious schools. Appellants' position in this regard raises no substantial question worthy of plenary consideration by this Court.

As this Court stated in *Norwood* v. *Harrison*, 413 U.S. 455 (1973):

> ". . . It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a state may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.
>
> ". . . Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private, non-sectarian schools in some circumstances —health care and textbooks, for example—a state could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance. . . ." *Id.* at 462.

See, also, *Brusca* v. *State of Missouri ex rel. State Board of Education*, 332 F.Supp. 275, 279 (E.D. Mo. 1971), aff'd 405 U.S. 1050 (1972).

Appellants' free exercise argument is equally insubstantial. They argue that because pupil transportation for children attending church-related schools is permitted under the Establishment Clause, it is a violation of the Free Exercise Clause not to so provide it. Previous decisions of this Court have established that there is an area between

the Establishment Clause of the First Amendment and the Free Exercise Clause of the First Amendment where action by government will not violate the former nor inaction violate the latter. See *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

In *Norwood* v. *Harrison*, *supra*, this Court noted that the Free Exercise Clause does not mandate what may be permitted under the Establishment Clause.

> "Our decisions under the Establishment Clause reflect the 'internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause,' Tilton v. Richardson, 403 U.S. 672, 677, 29 L.Ed. 2d 790, 91 S.Ct. 2091. *This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even 'neutral' services to sectarian schools. . . .*" *Id.* at 469. (Emphasis supplied.)

Even though Missouri could, without violating the Establishment Clause, furnish transportation to pupils attending church-related schools, this State is not "constitutionally obligated" by the Free Exercise Clause to provide such transportation. See, also, *DiCenso* v. *Robinson*, 316 F.Supp. 112 (D. R.I. 1970), aff'd 403 U.S. 602 (1972) in which the District Court stated:

> ". . . intervenors argue that the free exercise benefits which flow from aid to parochial education should prevail over the establishment clause values protected by strict separation, citing in support of their argument Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963).
>
> "While sympathetic to intervenors' dilemma, we note that it stems primarily from their personal evaluation of public school education. We reject the notion

that the Free Exercise Clause demands affirmative state action to accommodate such personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated. See Freund, Public Aid to Parochial Schools, 82 Harv.L.Rev. 1680, 1686-1687 (1969)." *Id.* at 123.

Therefore, appellees respectfully submit that appellants present no substantial question for the decision of this Court and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIORARI DENIED